

THE
LAW MAGAZINE

AND

REVIEW -

A MONTHLY JOURNAL OF JURISPRUDENCE
AND INTERNATIONAL LAW,

FOR BOTH BRANCHES OF THE

LEGAL PROFESSION AT HOME AND ABROAD.

New Series.

VOL. III.

LONDON :

REEVES & TURNER, 100, CHANCERY LANE.

EDINBURGH: CLARK, AND BELL & BRADFUTE.

DUBLIN: HODGES, FOSTER, & Co.

CALCUTTA: THACKER, SPINK, & Co.

BOMBAY: THACKER, VINING, & Co.

MELBOURNE: GEORGE ROBERTSON.

PHILADELPHIA: KAY BROTHERS.

NEW YORK: BAKER, VOORHIES & Co.

1874-

G. HILL, STEAM PRINTER, WESTMINSTER BRIDGE ROAD.

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THE LAW MAGAZINE AND REVIEW.

No. I.—VOL. III.—JANUARY, 1874.

I—THE FUNCTION AND INFLUENCE OF LEGAL JOURNALISM.

IN assuming the Editorship of this Periodical, it is natural that the Editor should explain the views and ideas upon which in his hands, it will be conducted, and this appears to involve the province or function of legal journalism and the influence it may exercise. These questions are necessarily connected, for the object, of course, must have reference to the influence which it is adapted to exercise.

The influences exercised in a profession like that of the Law, and still more the modes of their exercise, must necessarily vary with the character and influences of the age. Throughout the middle ages the scholastic spirit, which emanated from the closet or the college, and was embodied in the dialectical subtleties of the courts, cramped the whole character of Law. The result of this spirit was a rigid adherence to the letter of mere rules or statutes, and the only idea of legal education was their exposition by Readers in the Inns of Court. Hence, Cecil observed of the lawyers of his age, that "though learned in their profession, yet having no other learning, they, upon a question, demanded, bluntly answer it, and can go no farther, having no power to carry it by discourse or insinuation to the understanding of others." The reason was that they learnt law only by its practice, as a mere matter of practice or formal rules, without reference to general reason, and the principles

of jurisprudence, which would render it intelligible to the minds of men. Lord Bacon had the same opinion of lawyers, and described them as "walking in fetters," that is enslaved by this letter of rules, without reference to reason or principle. No one better understood the difference between mere experience and real scientific knowledge, and the vast superiority conferred by the latter. "Expert men," said Lord Bacon, "can execute, and judge of particulars, but the general counsels come best from them that are learned." And the finest passage in his writings is that in which he exults in the prospect of the improvement of law, and enlightenment of mankind, by the diffusion of knowledge through the Press. Political convulsions delayed the consummation of his hopes until after the Revolution, when the publication of the works of Hale, more perhaps than any other cause, tended to the slow but gradual improvement of the law. From that time to the present, the improvement has been progressive, though it was slow indeed, and hardly perceptible, until the influence of the periodical press began to tell upon public opinion in favour of legal reforms. That influence began to operate about a century ago, and we have seen in our own time the wonderful results. Since that time the progress has been rapid indeed, and we have now to reap the fruit; one of the results is a new judicial system, and another will be the gradual reconstruction of our law. In that great work, for more than forty years, the *Law Magazine and Review* has borne its part, and will continue to the utmost to promote it.

The utility of legal periodicals may be deduced alike from experience, and from the principles of human nature, and the nature of the profession. Dugald Stewart, the most practical of mental philosophers, has observed :

"There are two opposite extremes into which men are apt to fall in preparing themselves for the duties of active life. The one arises from habits of abstraction and generalization, carried to an excess; the other from a minute, over exclusive, and unenlightened attention to the objects which happen to fall under their actual experience. Care should be taken to guard against both extremes, and to unite habits of abstraction with habits of business, in a manner to enable men to

consider things, either in general or in detail, as the occasion may require."

The one, he points out, is the prevailing habit of men engaged in the active pursuit of a business or profession; the other is the characteristic of those who are only engaged in abstract speculations. It is manifest that the tendency of men in the former class to the extreme to which they are liable can only be counteracted by some influence continually exercised upon their minds, not withdrawing them from legal topics, but treating them constantly with reference to general principles, and the developement of law as a science. And it is difficult to imagine any way in which such an influence may better be exercised than by legal journalism—that is, by the discussion of legal questions, in writing, in that spirit, with reference, not to the interests of particular suitors, or the exigencies of a particular suit, but to the general developement of law and its consistency and coherency as a science.

A great concurrence of opinion, among lawyers and laymen, philosophers and statesmen, attest the fact that the mere *practice* of the law, apart from such general views and philosophic ideas, which belong to its study as a science, tends to narrow and dwarf, if not degrade the mind. Lord Bolingbroke observed this in one of the finest passages of his works, quoted by Lord Kames in one of those elegant and enlightened essays, in which he sought to stimulate to the philosophic study of law. The great Commentator was fully aware of the truth of the remark, and made it the basis of his great work, destined to achieve in this country what had been effected in Scotland. And Blackstone pointed out that the mere practice of the law will not suffice even to qualify for the pursuit of the law as a profession; a great truth, which lies at the basis of all the generous efforts made in our own time for the promotion of legal education. Speaking of the practitioner, he says:

"If practice be the whole he is taught, *practice must also be the whole he will ever know*; if he be uninstructed in the elements and first principles upon which the rule of practice is founded,

the least variation from established precedents will only distract and bewilder him. *Ita scripta est* is the utmost his knowledge will arrive at ; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *à priori* from the spirit of laws and the natural foundations of justice." Comm. 1, 32.

This description, unhappily, as Lord Mansfield had occasion to observe, has applied to judges as well as practitioners ; and, indeed, it could not be otherwise, in a country in which the judicature are taken entirely from the ranks of the practitioners. And hence that great judge had occasion to observe with cold sarcasm, in a case in which his more enlightened opinion was overruled by the majority of the Common Law judges :—

"There are, and have been always, lawyers of a different bent of genius and different course of education, who have chosen to adhere to the strict letter of the law."

That is—its letter—as distinguished from its spirit ; which is the whole distinction between law and equity, whenever they differ—if ever, on the same state of facts, and on the same question they *do* differ, a proposition denied by Lord Brougham, and disputed by Mr. Burke, who evidently was of Lord Mansfield's opinion that if ever law differs from equity it is simply *bad* law, owing to the narrow-mindedness of the judicature. This was formally declared, in Lord Mansfield's time, in a considered and elaborate judgment of a court of law, delivered by Sir Eardley Wilmot, and Mr. Burke, in a passage in one of the finest of his works, describes in his philosophic way, the causes and reasons of this degradation of the law ; which he ascribes to the ignorance and narrow-mindedness of the judges, and the influence, in an ignorant age, of the scholastic spirit—

"In the more early times, it happened that a rigid strictness in the application of technical rules has been more observed than at present. The minds of the judges were less conversant with the affairs of the world ; and not so much inconvenience was traced from a liberal adherence to the rule as might have arisen from an endeavour towards a liberal and equitable departure, for which further experience and a more continued cultivation of equity as a science had not then prepared them. The old lawyers were bred

according to the then philosophy of the schools in habits of great subtlety and refinement of distinction, and very great acuteness of mind was displayed in maintaining every rule, every maxim of law creation with punctilious exactness."

Mr. Hallam entirely agrees with Mr. Burke—

"Something of that excessive subtlety and the preference of technical to rational principles which runs through our system may be imputed to the scholastic philosophy which was in vogue during the middle ages."—Eur. ii. 338.

And Mr. Burke pointed out the source from which improvement arose—the study of the law as a science—

"As the law of nature and of nations came to be cultivated, as new views and combinations of things were opened, this over strictness gave way to the accommodation of human concerns for which rules were made, and not human concerns made to bend to them."

Mr. Burke and Mr. Hallam clearly perceived that the source of the evil lay in the pursuit of law as a profession, and the disregard of its study as a science. Speaking of Mr. Grenville, he observes :

"He was bred to the law, which is, in my opinion, one of the finest and noblest of human sciences—a science which does more to quicken and invigorate the understanding than all other kinds of learning put together; but it is not apt, except in persons happily born, to open and liberalize the mind exactly in the same proportion."

It is plain, from the context, that what Mr. Burke meant was that practically its study was not pursued as a science, but only as the practice of a profession. For he goes on to say—

"Passing from that study, he plunged into business (of office), and the limited and fixed forms established there, and it may be truly said that men, too much conversant in office, have rarely minds of much enlargement." * * *

"These habits are apt to give them a license to think that the substance of business is not much more important than the forms in which it is conducted. These forms are adapted to ordinary occasions, and, therefore, men who are nurtured in office do admirably well as long as things go on in their common order, but when the file affords no precedent then it is that a greater knowledge of mankind and a far more extensive comprehension of things is requisite than ever office gave, or than office can ever give."

There is a remarkable parallel between this passage and the passage in Blackstone already quoted, and there can be no doubt that Mr. Burke intended his remarks to apply *à fortiori* to the mere practice or business of the law, and that the reason he thought the profession of the law did not tend to enlarge the mind, was that it was pursued too much as a profession. It can be shown that from another passage that Mr. Burke thought the study of the law was as elevating as its mere practice was the reverse.

"The science of jurisprudence is the collected wisdom of ages, combining the principles of original justice with the infinite variety of human concerns."

And again he says:—

"The study of the law I think glorious, transcending that of any earthly thing."

But of the practice of the law it is manifest that he thought otherwise; that it tended not to enlarge but to narrow the mind. The same view had occurred to the mind of Mr. Hallam, who observes very truly:—

"No tribunals of a civilized people ever borrowed a little even of illustrations from the writings of philosophers or from the institutions of other countries. Hence law has been, indeed in general, rather as an art than as a science, with more solicitude to know its rules and distinctions than to perceive their application to that for which all rules of law ought to have been established, the maintenance of public and private rights."—Eur. ii. 328.

This is the source of the evil; the pursuit of law as a profession, or a trade, without any provision for its study as a science. And he goes on to speak of the "selfish views of practitioners." Mr. Hallam thus describes the extent and the results of the evil:—

"An evil which between the timidity of the legislature on the one hand and the selfish views of practitioners on the other, is likely to reach an intolerable excess. For being more inclined to stave off an immediate difficulty by some patchwork scheme of modifications and suspensions than to consult, for posterity, in the comprehensive spirit of legal philosophy, we accumulate statute upon statute, and precedent upon precedent, until no industry can acquire, nor any intellect digest the mass of learning that grows upon the

panting student, and our jurisprudence seems not unlikely to be simplified in the worst manner by a tacit agreement of ignorance among its profession."—Europe ii. 338.

The philosophical reasons for these are admirably given by Dugald Stewart, the most practical of our philosophers. He observes :—

" These who are qualified and experienced cannot be formed for the important situation of society, as their address is founded entirely on imitation or derived for the lessons which experience has suggested to them, and they cannot forcibly extend to new combinations and circumstances. Mere experience can at best prepare the mind for subordinate departments of life and conducting the established routine of business. The walk of unenlightened practitioners must necessarily be limited by their accidental opportunities of experience."

While, on the other hand, study of law as a science assists in its practice, for, as he observes,—

" The philosophic student of law is provided with principles which enable him to approximate to the truth in an infinite variety of untried cases. Nor is it in new combinations of circumstances alone that general principles assist us in the conduct of affairs. They render the application of our practical skill more necessary and more perfect. For general principles facilitate improvement of practical skill wherever it is requisite, and lessen the number of errors to which it is liable."

Hence, it is easy to understand how it is that great jurists have always been weary of the pursuit of the law as a business, and attached to the study of it as a science. We find the same sentiment in eminent jurists, such as Story; or in men of cultivated and elevated minds, such as Dr. Arnold, or of great intellects, like Coleridge; who observes " that the more you elevate trades into professions the better, and that every profession has its germs in science." The whole tendency of the practice of the law in our times, on the other hand, is to degrade it into a trade, and this is the inevitable tendency of pursuing it only as a profession. Coleridge observed :—

" Upon the whole, I think the advocate is placed in a position unfavourable to his moral being, and, indeed, to his intellect also in his higher powers." Therefore, I would

recommend him to devote a part of his leisure to some study which shall engage his powers in the investigation of truth alone, without reference to a side to be supported. Some such studies are what is wanted to counteract the operation of legal practice, which, like a grinding stone, narrows while it sharpens."

Such studies are suggested in legal journalism, well conducted, and filled, as they ought to be, with topics taken from constitutional and international law, with well written reviews, with biographies of eminent members of the profession, and the like. All these branches of legal literature, while not withdrawing the mind from legal subjects, tend to enlarge and cultivate it and give it a more liberal and enlightened tone.

Dr. Arnold was of the same opinion as to the difference between the study of the law and its usual practice. He observes :—

"The study of the law is quite to my heart's content. I think if I were asked what station, within possibility, I should choose, as the prize of my son's well-doing in life, I should say the place of an English judge. But then in proportion to my reverence for the office of judge is my abhorrence for the business of an advocate. I have been thinking whether there is any path to the Bench except by the Bar, whether in any other branch of the profession, a man may make his real knowledge available, like the *juris consulti* of ancient Rome."—Life ii. 12.

Nor was this the opinion merely of laymen ; it was also the opinion of eminent jurists. Thus Story wrote :—

"Law I admire as a science; it becomes tedious and embarrassing only when it degenerates into a trade."—Story's Life i. 83r.

And the life of that illustrious jurist shows the high esteem in which he held legal journalism, and the high importance he attached to it. He was throughout his life an industrious contributor to legal journals and reviews, and in this way at once exercised his own mind and enriched and cultivated the minds of others. It may be that to the early development in America of legal journalism that the superiority of

American lawyers as jurists is to be ascribed. Thirty years ago the late Mr. Justice Coleridge wrote to Story:—

“It is impossible for an English lawyer to read any one of your books without feeling that the position of an American lawyer is, in many respects, more favourable for an extended and scientific knowledge of law than that of an English lawyer. The simple circumstance that the American constitution forces international law on you as an integral part of your studies; and that, by something almost a necessity, the study of the Roman law is, in my opinion, an advantage far beyond that of our superior accuracy, if we have any, in our own Common Law—acquired in the comparatively narrow range of our studies. After all the most important thing is how we use our knowledge, and thus extended, liberal, and scientific study must liberalize and enlarge the power with which we use our knowledge of details.”—Story’s Life ii. 428

Mr. Story, writing to Lord Stowell, said:—

“It were well if the common lawyers had studied more extensively the principles of public and civil law, and had looked beyond their own municipal jurisdiction. In America we are not so strict as our mother country in our attachment to everything in the Common Law, and more readily yield to rational expositions, as they stand on more general jurisprudence.—We are anxious to build up our commercial law as much as possible on principles absolutely universal in their application.”

It is impossible not to imagine that one great reason for this may have been the greater degree to which the discussion of legal questions in legal journals was carried on in America. There is this great advantage in discussions of this kind over forensic arguments that they are not one-sided, nor framed merely to obtain a particular decision, but entirely for the elucidation of a legal question without any other object in view, and without being biassed by considerations of its result with reference to a particular case. In this respect it resembles a judicial judgment, the process and of preparation is that described by Story in preparing his own judgments. First he took notes of the principal facts, then he carefully examined all the cases bearing on the subject, reviewing and firmly placing on his record on the principles of law which might govern the case. By the aid of these principles he proceeded to examine the question on

its merits, and to decide accordingly, always first establishing the law in his mind, lest the hardship of the case should lead him to an illegal conclusion. Certainly American jurists were much earlier alive to the importance of an improvement in Legal Education; and matters of that nature are just the topics of discussion in legal journals, which influence the opinion of the profession.

"I have long been persuaded that a more scientific system of legal education than that which has been hitherto pursued, is demanded by the wants of the age and the progress of jurisprudence. The existing method is utterly inadequate to lay a just foundation for accurate knowledge in the learning of the law."—Story's Life, p. 486.

Many reasons might be given, and many authorities adduced, to show the beneficent influence on the minds of members of the profession, of the discussion in print of legal questions, by the light of legal principles and with constant reference to the development of law as a science. The discussion, in a written form, of such questions as from time to time arise, with reference to the principles of jurisprudence, cannot but have some effect in promoting the study of jurisprudence, and in assisting the practice of the law. Those who are engaged in its practice have got little time for its study, and can never find time to reduce into a written form, with care and consideration, the results of reflection and research. Hence, their study of any question is likely to be brief, hasty, and to result in a crude and imperfect kind of knowledge.

The discussion of legal questions in the press is of the more importance from the character of our judiciary law, which, until affirmed by a *supreme* court, is *not* law, but only evidence of it and open to argument. Mr. Burke observes of text books:—

"With us doctrinal books had little or no authority, other than as they are supported by adjudged cases and reasons given from the Bench."

But the same observation applies to *judgments* of the courts until confirmed by the highest tribunal. Until then they are themselves open to discussion, and if the particular

case is not appealed, it is only in the press they can receive such discussion. In this country there is not a power in the Court itself to appeal to the Supreme tribunal, and if the *suitor* does not do so, the law may be in doubt for many years, especially in the case of a division of judicial opinion and fresh applications of it to important questions as they arise. And no one can fail to observe that from time to time such questions do arise, which greatly interest the community at large, and are fully within the scope of ordinary intelligence, especially of educated and thinking men. It would be easy to find immediate illustrations of this within the last few years, or even months, or weeks. The publication of law reports in the *Times* reports, by barristers competent to understand and to make intelligible legal questions, brings home daily to the minds of men the constant application of law to their affairs and their interest in civil and criminal law is, in consequence, constantly augmenting.

The judgments of the judges themselves simply imply the importance of reasoning and argument in the development of law, and, therefore the value of legal discussion. As Mr. Burke observed, speaking of Courts of Error:—

“Questions of law are argued publicly by the judges in such a manner that every professor, practitioner, or student of the law, may learn the opinions of all the judges upon these points, on which some of the judges might be mistaken.”

And of course prior to the decision of the question by a supreme court, the reasons given by the judges are themselves subjects of legal discussion. Hence, Mr. Burke adds:—

“That nothing better could be devised by human wisdom than argued judgments, publicly delivered, for preserving alive the great traditional body of the law, and for watching while that great body remained unaltered, every variation in the application and the construction of particular parts, for pointing out the ground of each variation, and for enabling the learned of the bar, and all intelligent laymen to distinguish those charges made for the advancement of a more solid, equitable, and substantial justice according to

the variable nature of human affairs, a progressive experience, and the improvement of moral philosophy, from those hazardous changes in any of the ancient opinions and decisions which may arise from ignorance, from levity, from a spirit of innovation, or from other motives of a nature not more justifiable."—vi. 403.

Here, it will be observed, that Burke speaks of "intelligent laymen" as interested in the progress and development of law. Lord Brougham is eloquent to the advantages of political science, in which he includes the science of jurisprudence, and it will be seen what a wide and grand field for journalism it offers.

"The science which thus expounds the best modes of legislation, the true principles of jurisprudence, the more efficacious manner of making and of executing laws, which defines the rights of the people and their duties, as well as those of their rulers, and explains the rights of one nation with respect to those of another."

This is the subject matter of a legal periodical, such are the materials of which it treats, and Lord Brougham dwells upon the importance of discussion for promoting the knowledge of jurisprudence.

Thus it is that the invention of printing has modified ancient modes of usage, and introduced new modes of instruction. Hence the essays or the articles in a legal journal, to some extent, may assume the object of the ancient readings. Hence the aid afforded by legal periodicals to the promotion of legal learning and the diffusion of legal knowledge. Hence the interest which some of our ablest jurists have taken in legal journalism, and their frequent and valuable contributions to it. Lord Brougham in this country, and Story in America, may be mentioned as illustrious instances. Story was a constant contributor to the legal Journals or Reviews of the United States, and many of our ablest jurists have been proud to be found among the contributors to our legal periodicals. It is obvious that a carefully written exposition of a new and important statute may be of considerable use and advantage both to students and practitioners. And therefore it is proposed to give a series of readings on

the operation of the Judicature Act and the working of our new judicial system.

Lord Brougham, in his work on the Constitution, speaks of an important influence, almost amounting to a direct process, exercised by the discussion of all public measures through the Press. Thus he says :

“ This influence depends entirely upon the effects which such discussion produces upon public opinion, that is upon the minds of the people, by affecting whom it affects their representatives and their magistrates.”

And in the discussion often a wrong bias or impression may be given to procure opinion which may delay the adoption of important measures, or produce a permanent effect upon the mind of the people ; while of course a right impression conveyed through the same sources may produce corresponding advantages. Lord Macaulay, commenting on Lord Bacon's maxim, “ writing makes an exact man, reading makes a full man,” observes on the tendency of the present system, to develop plausible and superficial qualities ; especially facility in speaking, rather than more solid excellence. This, he says, is one of the most serious of the evils which are to be set off against the many blessings of popular government. He says :

“ The tendency of institutions like ours is to encourage readiness in public men at the expense of fulness and exactness. The keenest and most vigorous minds are often habitually engaged in the producing arguments such as no man of sense would ever put into a treatise intended for publication. The habit of discussing questions in this way necessarily reacts on the intellect of our ablest men, particularly those who are introduced into Parliament at a very early age before their minds have expanded to full maturity. The talent for a debate is developed, but they are fortunate if they retain unimpaired the faculties which are required in close reasoning or enlarged speculation.”

In this passage for Parliament read the Bar, and it is applicable extremely to the present state of the profession, and it illustrates in the strongest manner the utility of the habit of the discussion and exposition of legal questions in print. It is not merely the students or younger practitioners who may find such expositions useful ; older members of the

profession may often profit by them. It is astonishing how little those who are engaged in active practice know of the science, the theory, the principles, or the history of law. They know it, as Mr. Hallam says, more as a profession than a science; they know so much of it as lies within the boundaries of their ordinary practice, in which, so to speak, they work in a groove of a settled course and routine, and when questions arise out of those limits, and which can only be determined by the light of legal history or general principles of jurisprudence, they are utterly at a loss. This is what Blackstone, a century ago, predicated as inevitable of new practitioners, who knew nothing but what seems ordinary practice. A century before the great commentator wrote, Lord Keeper Guildford remarked, that if a man did not make himself a good lawyer before he got into practice, he never would become so afterwards. Lord Selborne once said that there were not a few in large practice at the Bar who knew little of law. The truth is that the characters of the lawyer and practitioner are not only not identical, they are generally different and distinct. They are as distinct as the character of the lawyer and the jurist. The judges are always practitioners, and, therefore, not necessarily all, equally, lawyers. That is, in the sense in which we use the phrase, by way of distinction, "Such a judge is a good lawyer." All practitioners, know enough, of course, necessarily to carry on their business at the bar, but that is not necessarily much; and when they get on the Bench they are not likely to have much time to study. Hence, when a nice question comes before them which can only be decided satisfactorily by the light of legal history or principle, they habitually decide it in accordance with present notions or received practice. Thus it was when, a few years ago, the question came before the Court of Queen's Bench, whether coroners could hold inquests on cases of fires. The solution of the question, in the light of legal history and legal principle, was clear. But the court decided with reference to mere practice, and so erroneously as to law. And so in many

other cases, not carried to Court of Error, and so open to discussion.

There are, again, many fallacies current among the profession which can only be dissipated by discussion in legal journals. For men much occupied in practice have not time to enter into these questions, and have a gregarious tendency to fall into grooves of thought, and follow each other in the use of received terms and phrases, which often embody the grossest fallacies. Such, for instance, is the common phrase as to "fusion of law and equity." Most members of the profession fancy that law and equity are somehow, because separate, opposed, and that somehow this opposition may be removed by fusion. Yet, as Lord Brougham pointed out long ago, law and equity are no more opposed than civil and criminal law, and can as little be fused. For, as Lord Brougham explained; on the same state of facts, and the same question, law and equity are identical. It must be so, for it is a fundamental principle of equity to follow law. Hence the equity can only differ from the law on a different state of facts, or a different question, from the legal one, and as that difference never can be obviated, therefore they can never be fused. Nor can there be any fusion, even in administration, by a mere union of the judicature, unless it can be administered in one proceeding, for if there must be two proceedings, they are equally distinct, whether it is to be in two courts, or two divisions of the same court. It is manifest, therefore, that the only complete fusion that is possible lies in its codification, which affects only the form of the law, and not its administration or its effect.

Innumerable other instances might be adduced of common fallacies among members of the profession, only to be dissipated by discussion in legal journals. There is a strange tendency in men to blind acceptance of current ideas, even though opposed to actual facts, daily within their observation, and yet not observed. So little, as Dugald Stewart says, do the mass of men observe out of the scope of

their own daily avocations and ideas. Thus, most members of the profession suppose that all matters of fact are determined in Courts of Law by juries on oral evidence, and in Courts of Equity by judges upon written evidence. Yet in the same classes of cases, that is cases relating to property, it is not too much to say that the matters of fact are rarely determined by a jury, and are generally, in Courts of Law as in Courts of Equity, determined by the judges upon written notes, or statements, of the evidence, either in the form of applications to review the verdict, or on *reservations* of the evidence, with power to the courts to draw *inferences of fact*; in other words, to decide questions of fact. And in Courts of Law, as in Courts of Equity, points of law are always, of necessity, decided on written notes of the evidence or statements of the facts, either upon points reserved or on special cases. It is only, for the most part, in classes of cases which arise out of torts, especially personal torts, which do not come into Equity, that cases are really determined by the verdicts of juries, and even in those cases the verdicts are reviewed by the judges on notes of the evidence. Innumerable other instances might be adduced, but these will suffice to show how questions may be elucidated and fallacies dissipated by discussion in legal journals.

Owing to the unfortunate separation of the jurisdictions, hitherto the practitioners in each have known little of the other, and hence mutual estrangement and reciprocal prejudices, the result of pure ignorance. Such fallacies and prejudices are often very injurious to the progress of improvement and the success of great measures, and a legal journalist may do much to remove them. Such is one of the many functions of legal journalism. It is obvious that from time to time legal and constitutional questions arise, some of which do not come into the courts, and which require elucidation, and may receive such elucidation in a legal journal. A legal journal is, indeed, the only medium for the exposition or discussion of such questions as they arise, without reference to any particular interest or

result, and entirely in the interests of law and jurisprudence as a science, and with the accuracy incident to written compositions, which must await the judgment of a learned profession. Lord Brougham, in writing generally of the Press, evidently contemplated such discussions of questions coming within the scope of political science and jurisprudence. He says :—

“On subjects like this every one who had well considered it must have formed his opinions, and it is therefore his bounden duty to declare them, openly and distinctly, after stating the whole case, and the reasons on both sides. He is fairly to expound the views and the arguments of those with whom he differs, and he is to give his reasons for retaining his own sentiments.”

This passage very well indicates the proper duty and function of the editor of a legal journal, prepared on any question to declare his own opinion, while giving full consideration to the opinions and ideas of others. From time to time legal or constitutional questions arise, or doctrines and opinions are put forth on such subjects, which require examination and consideration. Those who are engaged in the constant exercise of the functions of advocacy have no leisure to consider any questions except such as they are paid to consider, and then only with reference to the interests of those by whom they are retained. It is only in the pages of legal journals or periodicals that such questions can receive adequate, dispassionate, and disinterested examination. Nor is it only questions of municipal law which require such examination. Questions of international law from time to time arise which, may lead to war, and are of the deepest interest, not only to this country, but to the whole civilized world. Such, for instance, is the question raised by the case of the *Virginus*, whether foreigners sailing to another country with intention to assist insurgents there, can be captured on the high seas, in vessels bearing a foreign flag, and summarily executed? Such questions require discussion in a legal journal, and a monthly publication affords time for a more full and deliberate discussion of

them than can possibly be expected from daily or even weekly journals. Again, the influence of legal journalism is beneficial with reference to legislation, and changes in the law or the judicial system, especially in an age in which, as Savigny observed—the prevalent spirit is that of change, and political causes too often influence the changes which are made. As Mr. Burke observes, nothing is more easy and nothing more perilous, than change, without the most careful consideration and co-operation of various minds.

“The errors and defects of old establishments are visible and palpable. It calls for little ability to point them out. The same lazy, but reckless disposition directs the politicians when they come to work for supplying the place of what they have destroyed. To make everything the reverse of what they have seen, is quite as easy as to destroy. No difficulties occur in what has never been tried. At once to preserve and to reform is quite another thing. When the useful parts of an old establishment are kept, and what is superadded is to be fitted to what is retained, a vigorous mind, steady, persevering attention, various powers of comparison and combination are to be exercised * * * nor have I ever seen any plan which has not been mended by the observation of those who were much superior in understanding to those who took the lead in the business.”

And he then shows how this is, in words very well applicable, for instance, to the operation of our new judicial system :

“The effect of each step is watched ; the good or ill success of the first gives light to us in the second, and so from light to light we are conducted with safety through the whole series ; the evils latent in the most promising contrivances are provided for as they arise ; one advantage is as little as possible sacrificed to another ; we compensate, we reconcile, we balance, we are enabled to unite into a consistent whole the various anomalies and contending principles which are found in the minds and the affairs of men. From hence arises excellence in composition. When the great interests of mankind are concerned, the work requires the aid of more minds than an age can furnish.”

And, of course, therefore, the aid of all the minds of the present age which can be brought to bear upon the matter. Therefore the observations of any, however humble their position or their capacity, if moderately capable of under-

standing the operation of the system inaugurated, and carefully and constantly directed to it, in a spirit of candour and intelligence, cannot fail to co-operate with and assist, in some humble measure and degree, if only by suggestion, those who are responsible for its success.

Lord Brougham has pointed out the advantage of watching the operation of measures of legislation. He observes that—

“All legislation, to be profitable, or even safe, must be experimental, and, as it were, tentative. The prudent legislator must proceed with a confident reference to the effects which his measures have produced. Hence the absolute necessity of having full and regular details of the action of the law. We make some change in the system. We are bound to examine how the new law works. Unless we know all the facts connected with its execution how can we tell whether or not it was wisely, that is usefully, adopted. So long,” he says, “as human legislators are fallible, so long must their legislative labours require correction and elucidation. For their law must always admit of some doubt, and numberless points must escape the maker of the law, which can only be suggested in the course of its administration.”—Works vii. 227.

These remarks are peculiarly applicable to the great measure, the operation of which is now likely for a long time to enjoy the attention of the profession; and not merely of the profession but of the public, who have now come, in a great degree through legal journalism, to take a great interest in such subjects.

If indeed the writer were asked more particularly to describe his object, he would say it would be to show the operation of a judicial system, in the administration of justice, and the formation of law, a subject of special importance at this time, when the attention of the country is likely for some years to be fixed on the gradual transformation and reconstruction of our judicial system. The writer says “gradual,” for it is the opinion of the most thoughtful and reflective minds that it will probably be twenty years before the great work is consummated. More than one of our most experienced statesmen have thrown out this prediction, and in all probability

it is destined to be realized. During many years, at all events, the new judicial system will be in course of development, and it will be of paramount interest to watch its progress, operation, and results. And for this work the writer ventures to think he may have some special qualification. Thirty years in the profession—during the greater part of that period constantly in the courts—he has been for more than twenty years engaged in the study of our judicial system. It is 21 years ago since he first projected a work on the subject, and since he edited the first of the Common Law Procedure Acts. He also edited, in 1855 and 1860, the second and third of those Acts, and since then he has been continually in the courts, watching their operation, and engaged in preparing his work on the subject.

Another way in which legal journalism may be of use in aiding both the students and practitioners of the profession is in the exposition of new statutes. There used to be an office in our Inns of Court, that of the Reader, which now exists only in name, but which used to be of some practical utility in giving readings of new statutes. Such were Callis's Readings on the Statutes of Trusts, and Bacon's Readings on the Statute of Uses. These readings were of course carefully prepared, and probably written; and they were originally read, because in ages anterior to the invention of printing, the oral lecture was the only possible mode of instructing students. But when lectures could be printed, it is manifest that they would be far more available and valuable for purposes of study and instruction in a printed form, and then they could be studied at leisure, with far more effect than by being once heard. Hence, probably it is, that the readings became obsolete, and though in our own day they have been revived by Bowyer and Phillimore, yet their learned productions had a permanent value only when printed and published.

Nor is it only to the profession that such publications may be of interest. There is a wide field for them among the general public. Ever since the commence-

ment of the present era, forty years ago, there has been a great and growing interest in the public mind on legal topics. This interest has, to a great extent, arisen from the influence of journalism, and, in no small degree, to the *Law Magazine and Review*. Since its original establishment, the number of persons who take an interest in legal topics has largely increased, and that from various causes; partly through the large share now taken by the great mass of the middle class, in one way or another, in the administration of the law. The summary jurisdiction of the magistracy has been vastly enlarged, and the magistracy alone are a numerous class. Then there are the various systems of Local Government, Public Health and Sanitary Systems, the Poor Law—and now the Education Act, and many similar measures, all being carried out by the middle classes, who are thus daily and hourly brought into practical contact with law, to an extent which, half a century or even forty years ago, was unknown. Legislation is more and more bringing home law, so to speak, to the very doors of the people, and bringing them daily and hourly into contact with law. The Adulteration Act and the law of Conspiracy are recent and remarkable instances of this. Hence, of necessity, the number of persons interested in law has largely increased. But there is another and stronger cause, no doubt, in the greater interest taken by the public in legal subjects generally, since there is a greater and more general sense of their importance to the community. And hence it follows that a legal journal, not confined to topics rather technical and professional, but dealing with the broader aspects of law or of legal systems, and treating legal questions in a more popular manner, so as to bring home to the minds of the public at large a sense of their meaning and importance, would have a very wide field of interest.

Such are the general views and ideas with which the Editorship of this long established legal periodical is undertaken by the writer. It remains only to offer a few words as to the spirit and the manner in which it will be endeavoured to execute the work so undertaken.

Mr. Coleridge, in the prospectus to a journal he was to edit, avowed his motive and explained his object, and announced his subjects. His motive, he avowed, was "honourable ambition," that is, he added, "the strong desire to be useful; decidedly the wish to be acknowledged to have been so."

"That man," says Coleridge, "deserves the esteem of his countrymen who devotes the utmost efforts of his intellect to the disclosure and establishment of principles. For by these all opinions must ultimately be tried, and the feelings of men are only worthy of regard so far as they are the representatives of their fixed opinions."

In support of this view Coleridge refers to the writings of Burke, and points out how marvellously they were verified by results, owing to their having been founded on principles. To this also he ascribed the great interest still attached to his writings, and their permanent value as based on principles, which being true, are as true now as ever.

"Then, as now," he says, "existed objects to which the wisest attached undue importance; then, as now, judgment was misled by practice; time wasted in controversies, fruitless (except as so far as they quickened the faculties)—then as now, the general taste was capricious, fantastical, or groveling, and men were subject to delusion. The only remedy for this is the habit of bringing opinions to the test of tried and acknowledged principles."

In many passages of his writings were *undoubted truths*; that is, truths which all men on reflection will admit, and must necessarily admit, because verified by common observation and daily experience. These truths are to be found only in the works of master minds, such as, for instance, as the works of Mr. Burke: "In Burke's writings," observes Coleridge, "the germs of almost all political truths may be found." Mr. Buckle, though representing questions of the opposite school of thought, thoroughly concurs in this high appreciation of that illustrious man, and said of him that "his insight into the philosophy of jurisprudence has gained the applause of lawyers." And thus Lord Campbell spoke of him as "a philosophic statesman deeply imbued with the scientific principles of jurisprudence," (*Lives of Chief Justices*, II,

443.) Mr. Burke, as Coleridge said, "referred habitually to principles." And Burke pronounced a fine eulogium upon Lord Mansfield for his labours to make law keep pace with his time, because—

"He sought to effect the development of the law by making it keep pace with justice; not restraining natural justice withing artificial rules, but conforming the rules to the growth of human affairs."

That great object which Lord Mansfield found it difficult to carry out under the fetters of artificial positive rules, it is now happily easier to achieve, now that the rules of law have been made subordinate to justice, and it is an object in which a legal journalist may be proud to co-operate.

Lord Campbell, the eulogist of Burke, declared emphatically that "the law ought to be adapted to the exigencies of society and the spirit of the times." And Lord Campbell himself was eminently alive to the importance of legal journalism and open to its influence, as the liberal character of his legislative measures and his judicial expositions of the law abundantly show. We have lately heard an eloquent dissertation on the importance of our studying the spirit of the age. The adaptation of law to the progress of society, and the spirit of the age requires constant study, to deduce the application of old principles to new cases as they arise. This requires what Coleridge called :

"An honest and enlightened adherence to a code of intelligible principles, previously announced, and faithfully referred to, in support of every judgment on men and events."

Coleridge, writing of his own contributions to journalism, said, with honest pride :—

"I derive a gratification from the knowledge that my essays contributed to introduce the practice of placing the questions and events of the day in a moral point of view, in giving a dignity to particular measures by tracing their policy or impolicy to permanent principles and an interest to principles by the application of them to individual measures."

This, it is true, was written of a political journal, but as Lord Brougham observed, jurisprudence is an important

part of Political Science and Law, is nothing unless it can really be made to cohere with a system of jurisprudence which it cannot do, unless at least in accordance with moral justice. The fundamental principles of the Editor will seek to enforce are those of Mr. Burke and Lord Mansfield as to law, and those of Bentham as to procedure and judicature, that law ought to be in accordance with natural justice, and judicial systems in harmony with natural reason. The whole tendency of law, judiciary or legislative, is happily in that direction. The Adulteration Act, for instance, was a piece of legislation based on moral justice. And the new judicial system in an advance towards a rational system.

The Editor's idea is that the proper function of the legal journalist is to enforce principles not so much by way of abstract disquisitions as with reference to their practical application to legal affairs, the judgments or rules of courts, the operation of existing laws, or the measures of legislation proposed—that is to say, by way of comments upon actual affairs and proceedings. Such is the course pursued by his able contemporaries; and no one can read the able articles which from week to week appear in the legal journals of this country, or Ireland, or America, without feeling that they must be of the utmost advantage both to students and practitioners, and helping them to understand the decisions of courts or the Acts of the Legislature. It will be the Editor's object and hope to emulate his learned contemporaries, and he may add, to do ample justice to their labours. The spirit in which he intends to work, in one word, is that of justice.

That justice, which is now become the object of law, should be the pole star and the guide of the legal or political journalist in all the branches or departments of journalism, whether in the discussion of legal questions, the judgments of courts, the acts of judges, or the conduct of public men, the spirit of truth and justice should, and it is believed does, animate the legal journalist, whether in the editor or the writer. The same spirit should and will actuate the criticisms of legal works. Coleridge speaks of good criticism as "acute, argumentative,

and honourable," as founded on an honest determination to exercise judgment according to fixed principles and certain laws, and based on "universal morality and philosophic reason." And he mentions as marks of bad criticism "the substitution of assertion for argument, the frequency of arbitrary and sometimes petulant verdicts, not seldom unsupported by a single quotation from the work condemned, which might at least have explained the critic's meaning, if it did not prove the justice of his sentence, or extracts made without any fairness, and all without any reference to leading principles, or any attempt at argumentative deduction. The editor's idea of a good legal work is that which was thus happily expressed in a review in this journal, nearly 34 years ago of Story's "Commentaries on Agency:"—

"He has entered philosophically into the subject, has traced principles with persevering scrutiny and, without losing sight of the wants of a practical lawyer, has produced a treatise in which the student may ascertain the elements and principles on which the entire doctrine is founded."—*Law Magazine*, Feb., 1840.

One more word as to the avowal of Editorship. Lord Brougham is strongly in favour of *avowed* editorship or authorship of articles in the Press. He mentions anonymous journalism as an evil :

"Private individuals, bearing no certificate of any qualification to recommend them, assume the direction of periodical works, and do not give their names to the public. Their capacity for the task which they have undertaken is of course to be judged by the manner in which they perform it; about that there can be no difficulty. But their trustworthiness on grounds of opinion is wholly different, and of that, the most important portion of the character they ought to have, they furnish no voucher whatever."

No doubt, the noble author was speaking chiefly of the newspaper press, but the principle appears applicable to the periodical press in general. The periodical press, even in the form of a legal periodical, includes the expression of opinion on the deduction or application of law, and

occasionally, on the conduct and character of public men, and the merits of legal works, and in all these forms of journalism, the sense of responsibility attaching to open and avowed authorship or editorship, is a valuable guarantee, not only of intellectual honesty, but of thought, and consideration, and care. At all events, the Editor enters upon the exercise of his function with a strong sense of his responsibility, and an earnest desire to fulfil it honourably. And he has tried to show that his mind has been long prepared for it, by many years of labour in the courts, by competent acquaintance with the sources of law, and, above all, by reverent study of those great masters of thought whose works are best fitted to train and qualify the mind for such a task.

II.—CHANGES IN THE JUDICATURE.

MICHAELMAS Term, 1873, will be remembered in legal history, as commencing the last legal year under our old judicial system; and it was marked, also, by some great changes in our judicature which, in themselves remarkable, become still more so when considered in their bearing on the approaching changes in our judicial system. The Session of that year had been rendered memorable by the passing, under the auspices of a new Chancellor of rare eminence and influence, of a great measure for renovating our judicial system, and it appears probable that the measure will be carried out in the ensuing year under the same auspices. In the interval between the close of the Session and the opening of Term, the Lord Chief Justiceship of the Common Pleas and the Mastership of the Rolls fell vacant, and were of course filled by the law officers who had, under the Chancellor, co-operated in carrying the measure through Parliament; and a Vice-Chancellorship was also vacated and filled

by an equity lawyer, who, it is said, had assisted him in the drawing of it. At all events, it is manifest that the two first of these changes in the judicature must materially conduce to the cardinal and effective operation of the changes in our judicial system, and in the other appointment which took place it is not likely that this object was overlooked. It is impossible, therefore, to consider these changes in the composition of our living judicature, apart from their probable influence upon the approaching changes in the constitution of the judicial system, and accordingly in the comments made upon the new appointments, this was borne in mind. Before, however, thinking of the appointments to be made, the profession gave some sad thoughts to the memory of those whom they had lost. Happily, the Rolls was vacated only by resignation, and we all hope that the judicial veteran, Lord Romilly, will many years enjoy his well earned retirement. But the Chief Justiceship of the Common Pleas and the Vice Chancellorship were unhappily vacated by death, and the deaths of two men like Chief Justice Bovill and Vice-Chancellor Wickens, at an age which, with reference to their worth, may well be thought untimely—cannot but be regarded with melancholy and regretful reflections. They were very different men. The *Saturday Review* thus described these distinguished men :—

“The death of Vice-Chancellor Wickens was followed almost immediately by that of Chief Justice Bovill, so that the long vacation ended with the loss of two judges, each eminent in his way. The late Vice-Chancellor was in many respects a model of what may be called the university type of judge. He knew a great deal of law, but he knew a great deal of many other things, and what he knew he knew well. With very wide reading, a singularly retentive and accurate memory, and sound judgment, he had resources of literature at his command in a degree which few rival who have given themselves up to literature altogether. As a lawyer, he was noted, while at the bar, for the lucidity, good sense, and accuracy of his opinions, and everything seemed to show that he could, as a judge, acquire a commanding reputation. But, affliction and ill-health prevented him from doing justice to his powers after he became Vice-Chancellor; and he has

now died too early to leave a judicial reputation behind him. But the judgment of a profession is rarely wrong, and so much could scarcely have been expected of a judge without a strong probability existing that the result, if it could have been ascertained, would have conformed to the expectation."

Thus, also, it may safely asserted, on the unanimous testimony of the Equity Bar, is perfectly true and just. And the *Saturday Review* thus proceeded to describe the Lord Chief Justice:—

"Chief Justice Bovill was an equally good type of what may be termed the non-university judge. He began in a solicitor's office, he worked hard, he made himself an excellent commercial lawyer, he was a useful and successful advocate, and he won general good will, and even affection, by unfailing good temper and easy geniality, and by innumerable acts of kindness. He was for some time in Parliament, but without in any way seeking to make himself conspicuous, and even when he was a law officer he merely did the work that came in his way. He went through the House of Commons and the posts of Solicitor and Attorney General, in the due course of deserved promotion. When he was made Chief Justice, lawyers of all parties thought he had honourably earned the distinction, and were pleased that a man, popular and acceptable, had not been deprived, by ill fortune, of an adequate reward. It was the first Tichborne case that made his name and appearance familiar to the public, and no one could deny that a case of a most extraordinary character, length, and interest was placed under the superintendence of a legal dignitary who displayed an admirable patience and assiduity, and a cheerfulness which not even the prolonged tediousness of a never-ending story could dispel or materially impair."

This is perfectly true and just, as the writer, an eye-witness of that trial, and one who knew the late Lord Justice, at the bar and on the bench, for nearly 30 years, can testify, and he hopes to be able to pay to his memory the tribute of a biographical memoir.

It was impossible, of course, that the members of the profession could assemble at the opening of Michaelmas Term without some mournful recollections of those who had so recently been taken away from them. The key note of public feeling was well struck on the occasion in an admirable article in the *Times*:—

"Michaelmas Term opens sadly. The same troop of judges and of Queen's Counsel will attend upon the Lord Chancellor to-day as he and his predecessors have been accustomed to welcome, but, instead of the accustomed cheerfulness with which men assemble after a Long Vacation, there will, we believe, be but one sentiment of regret among the bench and the bar. One of the most popular of the Common Law judges has followed a most popular Vice-Chancellor, and both have died a premature death. Both branches of the profession are thus afflicted with the sense of sudden loss. The grave of Sir John Wickens is scarcely closed before that of Sir William Bovill is opened. Both of them have been taken away, leaving a career unfulfilled, and they are followed with the respect and affection of the profession under whose watchful eyes their lives were passed. Sir William Bovill may not, perhaps, be ranked as one of the great judges whose tradition is handed down through generations of the bar, but he was unsurpassed at Nisi Prius and in the practical mastery of Commercial Law, and his ready kindliness will be remembered by many a kind word to-day. Sir John Wickens, working in the comparative obscurity of Lincoln's Inn, was necessarily less known to the world; but the members of the Chancery Bar rise to enthusiasm when they bear testimony to his rare worth. A man of a humorous yet sad temperament, a miracle of learning, and largely gifted with a ready sympathy, sensibility, and wit, Death has taken him from the bench just when his promise of growing usefulness seemed greatest."

Every heart responded to the reflections thus suggested, and the feelings thus expressed. But these feelings found more authentic and impressive expression from the bench and bar, when the courts assembled. The Lord Chancellor, entering his court, attended by the other judges of his court, paid a touching tribute to the memory of the deceased judges. As the *Times* stated:—

"Before commencing the business of the day, his Lordship made the following observations, which were received with marked attention and sympathy by the Bar, who remained standing, and the numerous spectators with whom the Court was densely crowded:—'It is impossible for us to meet here to-day without a deep sense of the great losses the Bench and the country have sustained by the two eminent Judges so lately taken from us; and I feel sure I shall only be giving expression to the common feeling of all the members of the bar who are present, as well as to our own, if I attempt,

however imperfectly. to say a few words to express our sense of those losses. The late Vice-Chancellor Wickens, whom we should have hoped to see present in this court to-day, was united to all of his colleagues upon the bench, and to many of our brethren of the bar, by the closest ties of personal affection, while to some of us he was endeared by a friendship which dated from the days of early youth. He brought to the discharge of his high duties powers of mind and cultivation and accomplishments such as it falls to the lot of very few men to possess, and to those qualities he added a temper the most uniformly cordial and amiable, a judgment the most sound, learning the most extensive, and all the qualities needed to make a very great judge. The greatest expectations had justly been formed of him, and during the short time he was permitted to be upon the bench he has shown that if it had pleased God he would have fulfilled all those expectations. Of the other eminent judge whom we have lost those practising in this court have necessarily not seen so much, but all of us know how extensive was his learning, how great his experience, and all of us, I think, must know that there was no man of more indefatigable activity in the discharge of all his duties—no man of a more kindly heart. I feel sure that in the few words I have said I have expressed the feeling entertained by all members of the bar as well as by the whole bench of judges, and that such feeling will be shared in throughout the country.”

In the court of Common Pleas, when the judges took their seats, Mr. Justice Keating, the senior judge, who was evidently much affected, said these words :—

“In view of the melancholy event which has deprived this Court of its chief, had we consulted our own feelings we should have been disposed to adjourn the business. But so persuaded are we that such a course would be opposed to his wishes and feelings, who would not have desired the public interest to be postponed to any other consideration, we have abandoned that intention. The Court has sustained a most severe and serious loss—one to be deeply and acutely felt by every member of it. A most accomplished lawyer and distinguished Judge has passed away ; no man ever sat on this or any other bench of justice more ardently desirous of faithfully discharging his duties.

The new solicitor-general (Mr. Henry James, Q.C.) at once in touching and well chosen words, responded to the observations, and thus expressed the feelings of the Bar towards the late Chief Justice—In the absence of my learned friend the Attorney-General, I have been requested by my brethren of

the Bar to express to your Lordships the deep and sincere regret with which we have learnt the death of Sir William Bovill. My Lords, we all knew him as Chief Justice of this Court, and in him we all recognized a Judge singularly earnest in his determination to do justice to every suitor who came before him, and one who conspicuously fulfilled the first duty of an English Judge in seeing that right was ever done. To some of us it was given to know him more intimately. Those of us who had been his associates at the Bar ever found in him an honourable opponent or a loyal colleague; and full well we learnt to know that his vigorous intellect and his great earnestness secured to every client who intrusted his interests to his hands the truest and sincerest advocacy the English bar could provide. Some there are, my Lords, who knew him better yet, and those will mourn him most. Such of us as, may be, like your Lordships, enjoyed his private friendship, learnt how loving and gentle he was to those who were of him—how generous in his friendship to his associates, how considerate to those who were dependent on him, and how open and generous his hand to those who needed aid. If it be true that to live in the hearts of those we love is not to die, Sir William Bovill has not passed away from among us. A generation must go and come ere some of use will forget to mourn him, and ere, every one of those for whom I have spoken, every member of the English bar ceases to mention his name with regard and respect."

The New Appointments.—The tribute of respect thus paid to the memory of the departed, thoughts of their successors necessarily succeeded. As the *Times* observed:—

"Judges die, but their places must be filled. The work of the courts will not stop because one or another occupant of the bench is taken; and, indeed, their decease is a warning that now business is constantly accruing upon the accumulations of the old."

The Last Michaelmas Term under the old system was marked by many important changes in the judicial bench, both in Law and Equity, and the appointments to the vacant seats were naturally associated with the proposed changes in the judicial system, and especially with reference to the fusion of Law and Equity—that is the fusion of its administration, for in no other sense is it material. Three judicial seats which had become vacant were filled this term—the Mastership of the Rolls, the Lord Chief Justiceship of

the Common Pleas, and a Vice-Chancellorship. In vacation the Mastership of the Rolls had become vacant, happily not by death, but by resignation, the resignation of that veteran of the Equity Bench—the learned and able Romilly. The office was offered to Sir John Coleridge, the Attorney-General, and for sometime he had under consideration the question whether he should accept it or not. He had been engaged in carrying through Parliament a measure for the fusion of the judicial Bench, one of the fundamental principle of which was that law and equity should be administered by the same judges.

Sir John Coleridge wisely declined the Mastership of the Rolls, which was offered to, and accepted by, that able Equity lawyer, Sir George Jessel; and the *Times* thus expressed the satisfaction of the Equity part of the profession:—

“The members of the Equity Bar will probably be relieved when they hear that Sir George Jessel has been appointed Master of the Rolls. . . . Sir George Jessel becomes Master of the Rolls, and suitors in Chancery will have the advantage, which for some time they have sparingly enjoyed, of a judge who is at once expeditious and trustworthy. The late Solicitor-General may not be in all respects one of those whom all lawyers delight to honour; but even his failings lean to the side of strength. He has been a great advocate, and there is every promise that he will be a greater judge. He is a man who is never deceived by his own sophistry, and is not likely to be deceived by the sophistry of anybody else. Keen to discern the point of a case, and despising all efforts to hide it, his judgments will be prompt and sure, and the course of justice will not be thwarted by the painful efforts of a judge to escape the responsibilities and perils of a decision by forcing the parties before him to a compromise of their claims.”

For some time before his elevation to the Bench, Sir George Jessel had been one of the Law officers of the Crown; and in consequence of the protracted absence of Sir John Coleridge, owing to his engagements in the Tichborne case, had to undertake the charge of the Common Law business of the Crown, and therefore had to appear frequently in the Courts of Common Law, especially the Court of Queen's Bench.

There he discharged the business of the Crown with great energy, talent, and success, and gave the greatest proof of really superior ability in the facility with which he mastered a kind of business which must necessarily have been new and strange to him. Thus Sir George Jessel had already given ample assurance of his possession of qualities which would highly qualify him, not only for the effective discharge of his judicial duties, but for cordial and efficient co-operation in the working of the new judicial system. And our contemporary, the *Law Times*, after a Term's experience of the New Master of the Rolls, observed :

“ Sir George Jessel would appear to be setting an admirable example in more ways than one. His judgments are remarkably pithy and concise.”

Thus the anticipations entertained of the judicial character of Sir George Jessel appear likely to be amply realized.

The new Vice-Chancellor is no doubt a man of a different character, and his peculiar qualifications are of a different order. As regards the vacant Vice-Chancellorship, there was, apparently, some hesitation and delay in filling it up. It was not at first intended that the office should be filled up. The influences of a false and spurious economy, more properly called parsimony, which have been the curse and bane of our judicial system, were evidently exerted to overrule the better judgment of the Chancellor ; and there was delay. The *Times* said :

“ It has been suggested that the vacancy occasioned by the death of Sir John Wickens will not be at once filled up, but, though there are reasons which might make a delay intelligible, if not desirable, the Lord Chancellor can scarcely sacrifice suitors, as he must if he entertained such a design. When cases remain unheard eighteen months and two years after they are set down for hearing, and that in spite of being transferred from division to division for the sake of expediting them, there must be stronger reasons than we know of to justify any weakening of the judicial force on the Chancery Bench. The best excuse that can be offered is that Lord Selborne will take the opportunity of furthering the fusion of Law and Equity, and it is impossible to do anything towards grouping together judges trained on both sides of Westminster Hall except after some delay. Everyone would like to see

something of this kind done; but the Lord Chancellor has to remember other considerations."

•And the *Law Times* said :

"From inquiries we have made we believe it to be the intention of Government to leave vacant the Vice-Chancellorship recently filled by Sir John Wickens. The work of the court, it is reported, is to be transacted by the Lord Chancellor until the sitting of Parliament, when his Lordship will be wanted in the House of Lords. We need hardly say that by the adoption of this course the reasonable expectation of the Bar will be disappointed, and our highest judicial functionary is placed in an anomalous position. Lord Selborne's eminent capacity for the work of a judge of first instance is beyond question, but the combination of two offices in a single individual is generally inconvenient."

And particularly so in judicial offices, one of which is of original, and the other appellate jurisdiction. For some time, however, the Lord Chancellor did double work: but as Term approached, he found it impossible to do justice to the suitors in two Courts, and so it was announced that the vacant Vice-Chancellorship was to be filled up. It had been outrageous if it had been otherwise. There would only be four judges of first instance in Chancery, even when the vacant judgeship was filled up, and judicial statistics show that the amount of business in Chancery is ten times that of Law; yet there are 18 Common Law judges, and, striking off six for criminal business, there would still remain 12 for civil business; striking off half for cases of tort, not cognizable in Chancery, there would still be six Common Law judges to four in Equity, and then the judicial strength of Equity, compared to that of Law, with reference to the amount of property involved, would be obviously disproportionate. Still further to diminish the strength of the Equity judicature by making it only half that of the Common Law, at the lowest possible estimate, would have been madness. It is manifest that if the exigencies of economy or parsimony demand a reduction in the judicature, it cannot possibly be in the Equity part of it. And if that was the secret object of the Judicature Act, its attainment is indefinitely postponed. And, indeed, it is a hopeless

hallucination to imagine a judicature equally able for all kinds of judicial work, and equally supplied with all kinds of legal learning. Imagine a lawyer equally able to conduct a suit in Equity and a criminal prosecution; to determine the construction of a conveyance, and to try an action turning on contradictory testimony. The great advantage of a fusion of the judicature is not that all the judges should be equally able to discharge all kinds of judicial business, but that the men best fitted for each kind of judicial business can be delegated to it. At present, through the artificial separation of the Courts, this is impossible. There will always be judges who are fittest for dealing with some classes of cases, and some more fitted for others. Thus Mr. Justice Grove, with two or three skilled assessors, would try patent cases admirably; Mr. Justice Brett or Sir George Honyman would be strong in maritime or mercantile cases, and a good real property lawyer would be invaluable when a question of title had to be ascertained. When Sir George Jessel, Mr. Joshua Williams, Mr. Charles Hall, and other eminent men, profoundly versed in real property law, were arguing the case of *Roach v. Blake* in the Exchequer Chamber, it was impossible not to feel a suspicion that the bar were, perhaps, far better qualified to decide the case than the bench. It is now more than half a century ago since Lord Eldon told the House of Lords in plain terms that the Common Law judges did not understand questions of title, not being versed in conveyancing. Probably, considerations of this nature governed Lord Selborne in his recommendations as to the choice of the Vice-Chancellor. He chose a good conveyancer, an able equity draughtsman, who, no doubt, will be a highly useful member of the new judicature. The *Times* thus touched upon the topic:—

“ Lord Selborne will, naturally desire to employ the occasion to facilitate the operation of the Judicature Bill, but he will be confronted with the difficulty pointed out. How is it possible to fuse the practice of Law and Equity when we have neither judges nor Barristers who have mastered both? There is no person at the Chancery Bar whose qualifications to fill the office of Vice-Chancellor are so overwhelming that

he is pointed out on all hands as the man who must be preferred to it, and if Lord Selborne could find a member of the Common Law Bar who would be translated to Lincoln's Inn, he might introduce the exotic without giving rise to any recriminations. If, however, there be any one with such double qualifications, his name is unknown to fame. The diversity of procedure has hitherto been so complete that it is only in discharge of the higher functions of Appellate Judges, from whose determination questions of procedure are practically eliminated, that members of the two Bars may be freely intermingled with each other. The truth, as now brought practically home to us, must damp the faith of those who thought that as soon as the Judicature Act of last Session comes into operation next year the divisions of Law and Equity would immediately fade away. This consummation cannot be attained until we have secured unity of procedure, and, we may be bold to say, until we have brought all our practitioners and Courts, working together, in one spot."

We confess we do not see much in the last element, the only effect of which can be to facilitate mutual conference and consultation between Judges sitting in different divisions, which are at the best casual and imperfect. It is the composition of the Judicature which must determine its character and that, in a great degree, will determine the nature of the procedure. *The Times* observed:—

"It would appear desirable to secure the members of the future Common Law Divisions of the High Court; but it would, perhaps, be difficult to procure many of the class who would also be competent to conduct trials *Nisi Prius*. The Common Law Bar might, moreover, be apt to complain if they saw their chances of promotion diminished by one half, and they would not consider themselves fully compensated by the suggestion that one or two of them might become Judges in the Chancery Division. Indeed, the more the question is discussed the more convinced must we be that the administration of a complete jurisprudence in one Court will not be realized forthwith, and perhaps not until a generation has been trained up to undertake it."

The appointment of Mr. Charles Hall to the vacant Vice-Chancellorship appeared to give general satisfaction in the profession. It was an appointment of the same character as that of his predecessor, that is the appointment of a man of solid legal learning and great practical experience and sound

judicial qualities, rather than of one famed for brilliant advocacy or forensic success. Our contemporary, the *Law Journal*, had these remarks upon the appointment :—

“ Mr. Charles Hall succeeds Sir John Wickens as Vice-Chancellor. We heartily acknowledge the wisdom of the Government in avoiding all delay in filling up this judicial vacancy, and the Lord Chancellor on the choice thus made. No counsel at the equity bar had so large and so important a business as Mr. Charles Hall, and his appointment will be unanimously approved in Lincoln’s Inn. The learned gentleman, besides his high legal attainments, will carry with him the good will of those who have to practise before him—no small help in the Court of Chancery. There are objections to a judge of First Instance in Chancery who has never been a leader in the court ; but even those who are heard to urge those objections with some vigour do not go so far as to exclude from the bench an exceptionally able barrister who has not chosen to become Queen’s Counsel.”

So the *Law Times* wrote in terms of entire satisfaction at the new appointment :—

“ The new Vice-Chancellor was a pupil of Mr. Lewis Duval, the most eminent conveyancer of his day, and subsequently of the late James Russell, then an equity draftsman in very large practice. Though never raised to the dignity of a Queen’s Council, he was offered a silk gown by the late Lord Westbury, then Lord Chancellor, which he declined, and in the year 1864 he was appointed by the same learned lord one of the conveyancing counsel to the Court of Chancery. Since the elevation of the late Vice-Chancellor Wickens to the Bench, he has been the acknowledged head of the junior Equity Bar, and his business has been, it is believed, more extensive than that of any other stuff gownsman. It will be a source of satisfaction to the Profession and to suitors in Chancery to know that his elevation to the bench is due to his professional eminence alone, and not to any political considerations.”

There can be no doubt, that the class of lawyers to which Mr. Hall belonged—men behind the bar—are a distinct order of men from those who attain the front rank, and, while deficient in some forensic qualities, they may possess others of great importance on the Bench. They may have more learning, and judgment, even if less vigour and power of mind.

But the great event by which last Term will be remem-

bered is, no doubt, the elevation of Sir John Coleridge to the Chief Justiceship of the Common Pleas. And there are circumstances which render this event peculiar, indeed, almost unparalleled in the history of the profession. The only instance at all like it is that of Sir Thomas More, who was Chancellor, while his son was a judge. There is no more modern instance of it. Lord Raymond, the son of Thomas Raymond, a judge of the Pleas, became Chief Justice of the King's Bench, but not in his father's life time. The Earl of Camden, the son of Chief Justice Pratt, became Chief Justice and Lord Chancellor; but it was after his father's death. So Lord Chief Justice Denman did not live to witness his son's elevation. It was the peculiar felicity of Sir John Coleridge to attain to the Chief Justiceship of the Common Pleas in the life time of his father, who has thus lived to see his own honours transcended by those of his son.

Nor is this merely a matter of personal or biographical interest; it greatly enhances the qualifications of Sir John Coleridge for the high position he has attained. Not only has he had for the whole of his life the incentive of his father's example, but he has felt the influence of his father's mind, and had the benefit of his father's guidance. It is impossible to estimate the effect or the influence of of constant and familiar intercourse with such a mind as that of Sir John Taylor Coleridge, whose own career as a lawyer, or a jurist, and as judge, was so distinguished—extending over the whole period of his son's career, up to the very time of his ascending the Bench. And the retrospect of the father's career acquires at this time peculiar interest.

It is nearly sixty years ago, since Mr. Coleridge, writing, to Arnold of his intended pursuit of the law as a profession, spoke of it as favorable to ambitious aspirations, and elicited from Arnold the avowal of his dislike to the law as a profession. That was in 1817, and in 1813, in less than seventeen years afterwards, Arnold, now

more than forty years ago, was writing to Mr. Serjeant Coleridge, soon to be elevated to the Bench. In the interval, Mr. Coleridge had produced a learned edition of Blackstone's Commentaries, acquired a solid reputation as a lawyer and a jurist, and had, in many learned arguments, given evidence of the most solid and valuable qualifications of a judge. Two years afterwards, Arnold wrote to congratulate his friend on his appointment to a judgeship, an appointment "Honorable to the Government—honorable to yourself." Not long afterwards, Arnold—now that his friend was a judge and would not be hurt by the avowal—avowed his abhorrence of the practice of advocacy.

"The study of the law is quite to my heart's content, as is the practice of it in your situation. I think if I were asked what station within possibility I should choose as the prize of my own son's well doing in life, I should say the place of an English judge. But then, in proportion to my reverence for the office of a judge is, to speak plainly, my abhorrence of the business of an advocate. I have been thinking whether there is any path to the Bench but the Bar, that is, whether in conveyancing, or in any other branch of the law, a man may make his real knowledge available like the *juris consulti* of the ancients: that is, without the painful necessity of being retained by an attorney to maintain a certain cause, and of knowingly suppressing truth, for so it must often happen, in order to advance your own argument. I am well aware of the common argument in defence of the practice, still it is not what I can myself like."

It would have been interesting to read Mr. Justice Coleridge's reply to this, but we may be certain that it would have quite sympathized with his gifted friend's feelings on the subject, and that any apology he might have urged in behalf of advocacy, though no doubt entirely in harmony with his own practice, and his own pure conscience, would have failed to satisfy Arnold as to the inevitable tendency of the system in the great majority of men engaged in it.

That tendency, however, was effectively counteracted in Mr. Justice Coleridge, and the writer cannot forbear from quoting here a passage from Sir Joseph Arnold's admirable and interesting life of Lord Denman, a work of which we hope ere long to offer an appreciating review:—

"Sir John Taylor Coleridge was one of the most superior and highly-cultivated persons who ever adorned that famous tribunal. His career at Eton and Oxford was extremely brilliant. His academical successes did not prevent his working hard at law in London. He became an accomplished jurist and successful practitioner, but he never abandoned literature. After he procured his retirement, the Attorney-General thus expressed the admiration of the bar for his judicial character: 'To a clear and powerful intellect, to legal and constitutional learning, at once acute and profound, to a patient and unwearied assiduity and attention, he added the scarcely less important qualities of unvarying courtesy of demeanour, evenness of temper and kindness of heart.'—Vol. i. p. 20."

A few years before the elevation of Mr. Justice Coleridge to the bench, his illustrious relative, Samuel Coleridge, had thus written on the subject, and substantially he agreed with Arnold:—

"I think that upon the whole the advocate is placed in a position unfavourable to his moral being; and, indeed, to his intellect also, in its higher powers. Therefore I would recommend an advocate to devote a part of his leisure time to some study, such as metaphysics, or theology, something, I mean, which should call forth all his powers, and engage his mind in the investigation of truth alone, without reference to a side to be supported. No studies give such a power of distinguishing as metaphysics, and in their natural and unperverted tendency they are ennobling and exalting."

We know how admirably these sentiments were inculcated by the precept and example of Mr. Justice Coleridge, nor can it be doubted that the tendency of the metaphysical studies here described by their illustrious relative, in augmenting the "power of distinguishing," is highly conducive and advantageous to the mind either of an advocate or a judge. Educated at Oxford, where those studies prevail, they had their full influence on his mind, and that general culture of intellect, which is seen in Oxford men, was finely displayed in his career.

When Mr. Coleridge commenced his career as an advocate the unhappy tendency of advocacy was counteracted by all the influences which the highest mental culture

and the purest moral principles could apply. Nevertheless no one who saw the fine power of a Coleridge employed as often, unavoidably, it was, in defending guilt or advocating injustice, could avoid feeling a sentiment of repugnance, and hoping that the advocate felt it too. There is little doubt that the son, like the father, yearned for the exercise of the judicial office, so much more fitted for the character of his mind and moral nature, and in less than 9 or 10 years after being called to the bar he attained it, being made, in 1855, Recorder of Portsmouth. He could now, in the exercise of judicial duties as well as in studying the fine model of judicial excellence presented in the example of his father, train his own faculties, and form his own character, in preparation for the higher judicial station to which, no doubt, he aspired. Before his father retired from the bench, 1858, he had the happiness of seeing his son's brilliant success at the bar admired, and of knowing that his future elevation to judicial dignity was secure. Three years afterwards, Mr. Coleridge attained to the rank of Queen's Counsel, and four years afterwards he obtained his seat in Parliament, and commenced his Parliamentary career, which proved equally successful. In three years, on the formation of Mr. Gladstone's administration in 1868, Mr. Coleridge became Solicitor-General, and in 1871, on the promotion of Sir Robert Collier to the Privy Council, Sir J. D. Coleridge became Attorney-General. Three years more, and then, just after assisting in passing a measure to reconstruct our judicial system, he ascends to the judicial bench as the chief of a great court, and becomes Lord Chief Justice of the Common Pleas. It is natural to expect that with such culture, and after such a career, Sir John Coleridge ought to have a distinguished judicial career, and there is no doubt that the expectation will be realized.

It has been the fate of the writer to see six chiefs of this court — Tindal, Wilde, and Jervis, Erle, Cockburn, and Coleridge—and he ventures to predict that the last will be

inferior to none of his predecessors who are remembered. All agree that he has a large well-cultivated mind, and a great capacity for the study of jurisprudence as a science. The *Saturday Review* had these remarks upon the appointment:—

“ Even if custom did not give the Attorney-General the place, Sir John Coleridge would have had an indisputable claim to fill it. He has now and then shown a width of view and a general grasp of a considerable question which have done much to increase his reputation. Opinions will vary as to whether it is likely that he will do more than fill the office in an adequate and satisfactory manner. In the discussion of mere legal points he has not established more than an average reputation. To be eminent as a lawyer, however, is only one of the qualifications of a good Chief Justice. He has other functions, the discharge of which, in a masterly manner, lies at the bottom of much of the respect which in England is generally felt for the heart of the law. He has to maintain the dignity of the Court, and make juries and listeners feel that they are in the presence of a superior person, and he has to show on the occasion of important trials, that he can bring together disjointed facts, and weave threads of various colours and tinctures, into a whole on which an opinion can be satisfactorily pronounced. In these spheres of official duty, Sir John Coleridge is sure to attain a success beyond the average of success, attained by his predecessors in office. He will look, and behave, like a Chief Justice, and this is an advantage, which no one will underrate who understands that Chief Justices live in a little world of listeners, who wait to see and hear them before it forms an estimate of the amount of respect and admiration due to them.”

The *Daily News* had some admirable observations:—

“ Nature and art have combined to make him one of the most finished advocates the English Bar has ever seen. A commanding presence, a singular charm of voice and manner, a rich but disciplined style, a graceful and penetrating scholarship, a tone of high breeding, and unbending honour—these are among the gifts and acquirements which make Sir John Coleridge the most finished orator at the Bar; in some respects, we might add, one of the most finished orators of his age. Unlike many of those who pass from the strife of Parliament to the repose of the Bench, Sir John Coleridge, at the head of the Common Pleas, will by no means find his occupation gone.”

"In a Court of Law there are other things besides legal knowledge which go to the making of a successful Judge. The English people love to see their Courts presided over by men whose character, intellect, and bearing give dignity to the administration of justice. The respect of the subject is essential to the proper execution of the laws, and for this purpose we must have Judges who are something more than mere lawyers. An English Judge, and especially an English Chief Justice, should certainly be a lawyer, but if possible he should also be a scholar and a gentleman. To all three characters Sir John Coleridge has a powerful hereditary claim. As he has said himself, he is an Oxford lawyer, and the son of an Oxford Judge. The venerable Sir John Taylor Coleridge has had the rare felicity of living to see his son complete a career which, at the University, at the Bar, and on the Bench, has been but a repetition, only with still higher distinction of his own."

In this respect, indeed, the elevation of Sir John Coleridge to such a high judicial position, higher than that attained by his father, is, it is believed, almost without precedent in the history of the English Bench.

The *Law Journal* had these remarks :—

"We cannot doubt that Sir John will prove himself a worthy successor to the many great and learned men who have dispensed justice for centuries past in the Pleas at Westminster. So eloquent and mighty an advocate as Sir John must prove himself an accomplished judge at Nisi Prius. Though not equally strong as counsel on mere points of law, Sir John had that lucidity of expression which in ninety-nine cases out of a hundred is the reflex of a clear understanding; and, although his stock of legal learning may be but moderate, his intellectual power is amply sufficient to comprehend and appreciate the most abstruse and difficult problems of law. Neither would we undervalue the dignity of presence, the serenity of disposition, and the grace of diction for which Sir John is famous, for these are qualities which greatly adorn the Chief of a Court, tend to harmony between the bench and the bar, and secure order and the expedition of business."

And the *Law Times* observes :—

"With his fine faculty of speech he unites a singular capacity for apprehending rapidly the legal bearings of a case and applying legal principles. For this reason we anticipate that he will make an admirable Judge."

The elevation of Sir John Coleridge and Sir George Jessel to the Bench, vacated the offices of Attorney-General and

Solicitor-General, and the way in which they were filled gave rise to some observations with reference to the judicial bench. The appointments to those offices have a prospective interest to the profession and the public, because they are usually supposed to confer a kind of title to judicial office, and, therefore, to imply the possession of judicial qualifications. The chief of these qualifications, in the general opinion of mankind, are legal training, natural ability, and sound judgment, but in this country, by a traditional feeling very characteristic of the practical habit of mind, they are all supposed to be best secured by extensive forensic practice. The result has been, as men in large practice are hardly ever men of much learning, even in our own law, still less in jurisprudence, our judges are not necessarily lawyers, and are rarely jurists. Sir John Coleridge in our age as Blackstone in his own, was among the rare exceptions to the rule and there have been others, but still only exceptions. In former times these exceptional instances were certain to be selected by a discerning Chancellor for judicial promotion, and thus it was that men like Blackstone, with hardly any practice, and Sir John Taylor Coleridge without much, were made judges, and proved ornaments to the Bench. But the Reform Act, in this, and innumerable other ways, introduced disturbing causes into the actual working of our constitution, most pernicious in their operation. One of these is the fatal necessity of parliamentary influence, and the consequent preponderance of parliamentary considerations in the appointments even to legal judicial offices. The *Times* truly observed: "The choice of a Solicitor-General must be governed rather by political than legal considerations. It is necessary that the man selected should be learned in the law, it is more necessary that he should be powerful and effective in debate." Other names, it was added, will be discussed, and among these were some who, no doubt, will be consoled by the avowal that the preference for their brilliant rivals was dictated by political rather than legal considerations. As to Mr.

James, his large practice, his knowledge of law, and his undoubted ability, would have justified his appointment even had he been less successful in Parliament, and, of course, being Solicitor-General, his promotion to be Attorney-General naturally followed. As to Mr. Vernon Harcourt, professional opinion was a little exercised, especially with reference to future judicial appointments, as he was not in much practice at the bar. It has been, however, Mr. Harcourt's happy lot to have had enough of Common Law practice to understand it, and yet to have been spared its drudgery, and to have had ample leisure, while never out of practice, to pursue a more enlarged and prolonged course of legal and juridical studies than most other members of the profession. The truth is, that in our own time there is so much eagerness to get into practice—owing to the unhappy prejudice which, in this country, restricts the prizes of the profession to mere practitioners, that it is hardly possible for one who succeeds in his getting early into much practice to have acquired much store of law, even speaking of mere municipal law, still less to have acquired much acquaintance with the general principles of jurisprudence or with international law, or with civil law, the basis of Equity and of most of our colonial systems of law, acquaintance with which is essential to qualify men to sit in the supreme tribunal of the empire.

There appears to have been no doubt that he would be an able law officer, the doubt was as to his qualification for high judicial office. The purely professional view of the new appointments, inspired chiefly by anticipations of future promotion to the Bench, was conveyed in the *Law Times*:—

“Mr. Vernon Harcourt is not a Solicitor-General of the conventional type. Having been for a number of years a member of the Parliamentary Bar, he relinquished the active practice of his profession to pursue political honours. His success as a debater has been unquestionable, and that he possesses very considerable power is universally admitted. From a political and administrative point of view a man with these qualifications must be a most desirable law officer; but we anticipate that his want of familiarity with the practice of

the ordinary tribunals will be found to be a drawback of no small magnitude. A law officer must be something more than a good lawyer, perhaps more of a Parliamentary debater and a man of letters than a lawyer. For this reason we incline to think that Mr. Harcourt will make just such a law officer as we want at present. But it is perfectly clear that he would make an inefficient Chief-Justice of any of our common law courts; and if, by the further elevation of Mr. James, Mr. Harcourt became Attorney-General, it is certainly desirable that the next vacancy in the Chief-Justiceships should not be regarded as his as a matter of right."

And the *Law Journal* had observations of a similar tendency. Our contemporary is rather in error as to Mr. Harcourt's professional antecedents; he has never relinquished the active practice of his profession. For nearly twenty years he has pursued it; he commenced in the ordinary courts of law, in the time of Chief Justice Jervis; the writer well remembers him arguing cases in the courts with great ability, recollects that eminent judge highly complimenting him for his able arguments, and heard at that time that the late Mr. Justice Willes spoke very highly of his legal capacity. For some years Mr. Harcourt pursued the practice of the Common law, he then went into the higher and richer walk of parliamentary practice, and achieved a high position. Becoming a member of the House, he had, of course, to relinquish this lucrative practice. But he had never relinquished the practice of the Common Law bar; he then returned to it, and has ever since continued it. His practice was not large, but it was larger than that of Sir R. Collier after he had ceased to go circuit, and was large enough to bring him constantly, from time to time, into the courts of law both at Westminster and on Circuit, and always in cases of some magnitude. The mind of Mr. Harcourt is not of a type to trouble itself with petty litigation, and no doubt his clients understood it. He generally had some cases at every assize on his circuit, and they were always good cases. So in the courts at Westminster he has been in some great cases, in the Queen's Bench, the Foreign Enlistment case, for instance, and the great Epping Forest

case, in which he was retained, along with a host of the most eminent men at the bar. His practice has been small compared with that of Mr. James, but his abilities are great, and his practice has been quite sufficient to teach him the business of his profession. Even if Mr. Harcourt, however, had had less forensic experience than he has, it would not in the least detract from his qualifications for high judicial rank. As an able daily journal lately observed on the occasion :—

“The qualities which constitute an eminent advocate and a successful Judge are of so different an order, that it is impossible to predict beforehand, with absolute certainty, of any lawyer however distinguished, that he will command on the Bench the same weight as he carried at the Bar.”

And it is beyond a doubt that our best judges have been men who have not been first-rate advocates, while our most brilliant advocates have not made the best of judges. The truth is, that some of the functions required for the two offices are not only different but distinct, and entirely opposite. And the qualities required for the Bench, especially for its chief seats, are rather learning, intellect, and judgment, than mere forensic skill (often, unhappily, tending to craft), or great practice in the arts of advocacy. But not always great advocates in large practice have much legal knowledge. The remark was made, a few years ago, by the Lord Chancellor, of many of them; and it had been made two centuries ago by a predecessor of his, the Lord Keeper North, who also suggested the true reason. On the whole, therefore, we think that the *Saturday Review* was right when it thus expressed the general opinion of the profession and the public :—

“With the details of Common Law practice Mr. Harcourt is less familiar than some of his competitors at the bar, because he has earned his professional rank at the Parliamentary bar.” This, to some extent, is an error, as already stated. It was by no means entirely so earned.

“But when his official duties require his appearance in Westminster Hall, there is little doubt that he will prove himself a sound lawyer, as well as a brilliant advocate. No

other member of the bar has devoted an equally long and systematic study to the doctrines of international law, which have lately acquired such novel importance. And, while the Attorney-General will bring to the considerations of such questions an acute intellect, well furnished with legal learning, his colleague will possess the aptitude which arises from familiarity with historical and legal precedents."

Nor do we in the least fear the elevation of either of them to the judicial bench. They are, no doubt, neither of them what may be called "case" lawyers, though it is known that Mr. James has worked hard at the study of the law, and has a very competent knowledge of ordinary laws; while, no one can doubt that his colleague has a more than ordinary knowledge of constitutional and international law. But they are both men of very powerful and enlarged minds, and very superior ability, and with the knowledge and capacity they have, and the other great gifts they undoubtedly possess, they would make very able judges, and would co-operate very ably in the great work of the transformation of our judicial system. Therefore, though we hope it may be long ere any vacancy occurs, we confess we are under no apprehensions for the future, as to the perfect competence of either our new-law officers to fill such vacancies as may occur.

No doubt Mr. Harcourt might not make a good chief of a Common Law court, as the courts are now constituted. But our contemporaries forget that the courts are to be re-constituted, and that there is to be a Court of Appeal, composed of judges different from those who exercise first instance jurisdiction, and hearing appeals from the colonies. And for that court especially, with reference to colonial appeals, Mr. Harcourt would have the highest qualifications. The wide range of his knowledge of jurisprudence, would eminently fit him for such a tribunal. His fame is widely spread; it has reached America, and has reached our colonies. Our able contemporary, the *Albany Law Journal*, lately had a paragraph about him:—

"Mr. Vernon Harcourt, whose name is familiar to our readers in connection with the recent congress of international

jurists, has been appointed Solicitor-General of England. He has long held a high rank at the bar, and has won an honorable parliamentary reputation. Last session he drew from Disraeli the remark that he 'talked like an Attorney-General.' As he is but one step from the Attorney-Generalship, he has a fair prospect of talking not only *like* an Attorney-General but *as the* Attorney-General."

There could be no doubt that such a man, though perhaps, from want of familiarity with practice, unfitted for first jurisdiction, would be a valuable member of the Court of Appeal. He is one of the few of our lawyers who are entitled to be called jurists. One of the advantages of our new judicial system, will be that it will establish a general Court of Appeal, composed of a distinct and higher order of judges, from those engaged in ordinary business. In the constitution of this appellate tribunal, on account of the wide range of its jurisdiction, great variety of qualification will be required, and Mr. Harcourt is one of those members of the profession who, to the highest abilities, and a great deal of practical legal knowledge and experience, unites a large acquaintance with jurisprudence as a science.

III.—ILLUSTRATIONS OF OUR JUDICIAL SYSTEM. * PART XII.

By W. F. FINLASON, Editor of the "Common Law Procedure Acts," of "Nisi Prius and Crown Reports," and of "Reeve's History of the English Law."

THE CHANCERY SYSTEM. PLEADING AND PROCEDURE.

IT has been seen that the Chancery system has practically proved itself so immeasurably superior to Common Law in its practical results that there must be some element of superiority in the Chancery system of procedure; nor is it difficult to discover what that is. It is simply this, that at

* These articles, which are now nearly completed, are introductory to another series, which will shortly be commenced on the operation of the New Judicature Act, and the New Judicial System.

the outset, at the very first step, the plaintiff is required to state clearly the specific facts upon which he grounds his complaints; and that then the defendant is obliged to answer upon oath—clearly and categorically—to interrogatories propounded to him on the case so stated. The result of this is, on the one hand, that the plaintiff is fixed to his case and the state of facts on which he rests it, and the defendant, on the other hand, is at once obliged to disclose all that he knows as to the truth of the matter in dispute. The result of this is that in consequence of the admissions thus obtained on one side, and the distinct statement of the case on the other, evidence in most cases is dispensed with, at all events beyond such proof as can be economically and easily supplied by affidavit, and in very few cases is there such a dispute as to facts as to require evidence to be taken. Thus, out of 1350 suits instituted by bill in one year, about 1100 would be heard on bill and answer, and only the remainder, about 250, on evidence. The effect of this, of course, is greatly to economize time, as in all systems it is the taking of evidence which occupies time and involves expense, and though at Common Law the trial itself, as it is oral, does not usually take a long time, cases have to wait a long time for trial. And trial is hardly ever final. This shows that the Vice Chancellor was right in his recent expression of opinion on the subject:—and our able contemporary, the *Law Journal*, overlooked the distinction between the nature of the cases in Equity, and at Common Law.

One great reason why the Chancery system is in many respects so much better than the Common Law, and would be infinitely more so were it fully carried out, is that it proceeds at once by prompt and direct interrogatories addressed to the defendant, and answered by him upon oath. Lord Eldon once said, the obligation to answer upon oath is the vital essential principle of Equity procedure. It is true that the principle of the Chancery system is not carried out, because the principle is oral interrogation that the defendant should be orally examined, that is, that his

answers should be oral, so as to afford no time for evasion and preparation. This, however, would be impossible without a far more adequate judicature; and, therefore, though it was the original practice in Chancery, it has for ages been unavoidably abandoned, and the answer is taken in writing. This, of course, affords an opportunity for evasion, and hence the Chancery system is not carried out. As long a time as possible is taken to answer, and the answer drawn by counsel in writing is as evasive as possible. Nevertheless, with all these disadvantages and drawbacks, so effective is direct interrogation that in many cases it dispenses with evidence, and in those in which it does not do so, it seems to show precisely what are the points which are at issue between the parties, and on which evidence will be required. And while, on the one hand, evidence can be taken in the first instance in writing, which is a great advantage where the facts stated are not disputed; on the other hand, where facts are in dispute, witnesses can be cross-examined orally before the judge himself, just as in the Court of Probate or the Court of Admiralty, where cases are constantly heard by the judge alone. That the procedure in Chancery is, or might be, far more effective and less dilatory than that of Common Law can be shown by many instances and practical illustrations. Thus a bill may be filed and answered in a month; the answer may, by its admissions, dispense with further evidence, and the case may be at once set down to be heard on bill and answer, or the answer may show that the bill cannot be sustained, and the suit may be at once abandoned. In July, 1871, a bill was filed in the Court of Vice-Chancellor Malins. Before the end of the month it was set down for argument on demurrer for motion for injunction, and the demurrer being overruled and answer filed, and evidence to open fully the case was tried in the April following.* Again, one of the first cases heard by Lord Chancellor Selborne was one which will be a leading case on the

* *Simpson v. Ingleby. Times, April 28, 1872.*

subject to which it relates (the law of nuisances in noise) and which had been heard by his Lordship in last Michaelmas Term. It had been heard before the Master of the Rolls, in last February, and the suit was not instituted until after October, 1870, less than two years before it was finally heard on appeal.* Yet, in the meantime, evidence to an enormous extent had been taken, and the case had undergone the fullest possible investigation. Suit instituted November, 1870, case heard on evidence in February in next year, and heard on final appeal in the following November. And this in a case of unusual difficulty, and contested with obstinate tenacity on both sides. Again, in another case heard by Lord Selborne, in last Term, on appeal, the bill was filed in June last,† before the end of next month, it had been brought before the Vice-Chancellor on a motion for injunction, and in November it was heard on appeal before the Lord Chancellor. Again, in another case an agreement was broken in August, 1871, the suit could not really be commenced until after the long vacation in October, and it was heard in May.‡ Again, an injunction suit and case of nuisance was heard by Vice-Chancellor Bacon, upon evidence fully taken within nine months after the filing of the bill.§ In another nuisance suit the bill was filed in June and heard in the same year before the Vice-Chancellor, and in the March it was heard on appeal before the Lord Justices.|| It is to be observed that the Court of Chancery is sitting, unlike the courts of law, nearly all through the year, and that an injunction can be moved for in a few days after a bill is filed. Thus, early in March last, an injunction was moved for before the Master of the Rolls, on a publication in the February,¶ towards the end of 1870 the proprietor

* Gaunt v. Fynney. *Times*, Nov. 15th, 1872.

† Hoare v. Bremridge. *Times*, Nov. 9th, 1872.

‡ Davis v. Park. *Times*, May 2nd, 1872.

§ Attorney-General v. The Borough of Birmingham.

¶ Boshell v. Whitworth. *Times*, March 22nd, 1870,

¶ Drewett v. Sutton, *Times*, March 7.

of the Eureka shirt filed a bill for an injunction, and it was heard and declared in that year, and appealed in March next year.* The motion being finally refused until the hearing of the cause after evidence, on the ground that it then could be entirely disposed of before the Long Vacation, it was heard and finally decided on the evidence by the Vice-Chancellor, and then heard on appeal in June.† Again, on a nuisance case, the bill was filed in November, and on evidence in March.‡ A couple of months may be ordinarily allowed to a defendant to answer in equity,§ but so long a time is often obtained to plead at law, and there is this great difference that in equity the facts are disclosed in the answer, whereas at law they are never disclosed in the pleading. Two consequences of great practical importance follow from this in favour of Chancery pleading: first, that if a party desires to take the opinion of the court on a question of law arising on the facts, he can do so by demurrer, whereas at law the real facts are rarely, it has been seen, stated; and next, that if, on the other hand, the parties desire to go into evidence on any matters of fact not admitted between them, these matters are clearly defined on the face of the pleadings, which is never the case in pleadings at Common Law. Hence, as Sir George Jessell observed the other day, a demurrer will really, in a court of equity, raise a question of law between the parties, upon the real facts as stated and admitted, in the most simple and economical manner. And unless upon the face of the bill there is no case to call for an answer, the demurrer will be overruled, and the defendant will be called upon to answer on the merits. He may, indeed, plead, but then a plea in equity, unlike a plea at law, must be a clear bar to the suit, on some short decisive ground, admitting of direct and positive proof, and if this proof be a fact not really in dispute, it can

* *Ford v. Foster*, *Times*, March 8, 1870.

† *Ford v. Foster*, *Times*, June 11, 1872.

‡ *Attorney-General v. Mayor of Leeds*, *Times*, March 8, 1871.

§ *Brown v. Wales*, before Vice-Chancellor Wickens, Michaelmas Sittings.

be supplied by affidavit without the expense and delay of trial or taking of evidence, and the case is virtually at an end, or argued on demurrer to the plea if there be a doubt as to its legal validity. But unless it is arguable it will be summarily overruled, and the defendant will be called upon to answer. And in most cases this is the only course open to a defendant in equity to a plain direct answer to the merits upon oath, and by way of a statement of facts. It is not to be wondered at that such a procedure should be so infinitely more effective than the artificial and antiquated procedure of the Common law. But, as Lord Eldon said, the vital essential principle of the equity procedure is the obligation to answer upon oath, and it is melancholy to think that the Judicature Commissioners, casting aside the experience of ages, should have recommended the abandonment of this vital principle! And this, in opposition to the opinions of the wisest and ablest judges at Common Law, as well as of equity, a Denman, as well as an Eldon.*

Moreover, in cases which require promptitude, as injunctions, of which alone nearly 150 are issued in the course of a year, the proceedings in Chancery are so speedy that they allow a degree of promptitude unknown at Common Law. In a few days, it may almost be said hours, an injunction can be obtained in a case which really requires it. Even in ordinary cases, which do not require such extraordinary speed a case can be brought before the Court in a few days—say a week or two. Thus, last summer, a foreign commodity made, as was alleged, in imitation of an article of the plaintiff's manufacture arrived here for sale towards the end of one month, and at the end of the first week of the next month the case was heard. The goods arrived for sale on the 26th June, and the case was heard on the 6th July.† It would be hardly possible to attain a higher degree of speed than this, unless the natural system of oral application

See Sir J. Amould's admirable life of Lord Denman, just published.

† Anglo Swiss Company's case, Court of Vice-Chancellor Malins, *Times* July 7th, 1872.

is allowed for affidavit, and in no court can it be safe to exercise a mandatory jurisdiction, such as prohibition, mandamus, or injunction, without some written statement upon oath. In courts of law, writs of prohibition or mandamus, however, only issue on cause shown, which involves some degree of delay, but in the Court of Chancery the injunction may be issued at once, on *ex parte* application, on a proper case, which requires no more than simple statement and verification on oath. If the natural system of procedure is not carried further in Chancery it is only because, from the extremely moderate strength of the judicature, it is utterly impossible.

A very remarkable case, illustrative of the difference between the superiority of Chancery and Common law systems of procedure occurred at the London sittings, 1872, and which was then reported in the *Times*.* The case arose out of a transaction which had occurred nearly ten years before, and which had been nearly that time in litigation at law and in equity; and it is one eminently illustrative of our judicial system. In 1863 the plaintiff, Mr. Plant, was negotiating with the late Duke of Newcastle for the lease of a colliery; and, under the impression that he could obtain the colliery, invited a Mr. Daniel to join with him, who assented, and agreed that if Mr. Plant could obtain the lease he should share the proceeds and have part of the profits. In the result he effected this object, and the lease was to Daniel alone, who commenced the formation of a company with the view of selling the colliery to them. Meanwhile, Mr. Plant was anxious to make sure his right to his share of the proceeds, and he employed Mr. Pearman, a country attorney, as his attorney for the purpose. Mr. Daniel, however, repudiated the claim, asserting that, after all, it was he and not Plant who had really obtained the lease. Thereupon a suit in equity was commenced against Mr. Daniel and the company to enforce Mr. Plant's claim,

* *Plant v. Pearman*. See *Times*, 18th Dec., 1872.

and in September, 1864, the bill was filed. In November Mr. Daniel filed his answer, from which it appeared that the negotiation had been put an end to, and a new company had been formed with the same object in view, so that suit was at an end. With this new company Mr. Daniel proceeded to negotiate the sale, and when the plaintiff, in December, 1864, discovered it, he proceeded to commence a suit against Mr. Daniel and the second company. In the meanwhile, however, the negotiation for the sale proceeded, and early in January, 1865, before the bill was filed, and the company having no notice of Plant's claim, the sale was completed, and the money was handed over to Mr. Daniel. In the same month of January, but after the payment, the London agents of Pearman gave the company notice of the claim of his client, Mr. Plant, but it was too late, the money was already paid over, and he was left to his remedy against Mr. Daniel. That remedy he pursued. The suit was prosecuted, and in another month the answer upon oath was obtained which virtually, so far as the company was concerned, disposed of the suit. In February, 1865, the answer came in, denying the grounds of Mr. Plant's claim, and declaring that so far as regarded the company they were blameless, having had no notice of the claim. Mr. Plant now, in April, 1866, filed a "supplemental" bill. The answer disputed the grounds of his claim, and evidence had to be taken. Hence, and owing to the crowded state of the cause lists in Chancery, the cause did not come to a hearing until May, 1868. It was heard before the Vice-Chancellor, and he decided against Mr. Plant. He, however, appealed; and so speedily are appeals heard in Chancery, that, in November in the same year, the case came before Lord Cairns, who reversed the Vice-Chancellor's decision, and gave a decree in favour of Mr. Plant, that he was entitled to four-tenths of the purchase money, subject to deductions. Then, however, came the question of accounts, Daniel setting up various deductions from the amount which Mr. Plant would be entitled to

receive under Lord Cairns' decree. The accounts went in due course to the Chief Clerk, and in the result, in the course of 1869, he gave his certificate for a sum of nearly £9,000, which, with costs, would come to nearly £10,000. Here, therefore, were three successive Chancery suits all brought by the pleading very soon to issue, and two out of the three disposed of without further proceedings. In the other, whatever delay occurred was clearly owing to the pressure of business and the inadequate strength of the judicature and judicial officers. Very different was the case at Common Law, where the delay was clearly owing to the procedure or the unfortunate arrangement of the judicature. The party sued in Chancery having died bankrupt, an action was brought against the attorney for not registering the suit as *lis pendens*. The action was commenced in December, 1869, and the declaration stated, in the usual form of Common Law pleading, that the defendant, the attorney, "though requested to do so by his client," had "neglected" to register the suit as pending. Thereupon, in the first instance, the defendant denied that he had been so requested, and the plaintiff demurred to the plea as immaterial, on the ground that whether requested or not it was the attorney's duty to do it. The defendant, on his part, denied any such duty, and on the question of law thus raised the case went before the court; that is, it went into the "Special Paper," as it is called, and there being only a few "Special Paper" days in the Queen's Bench in each Term, the case did not come to be argued and decided until January, 1872. The Court then determined the point of law in favour of the plaintiff, so far, at least, that it appeared that *prima facie* there was a liability. But then they pointed out that facts were not stated showing it was the duty of the defendant to register the suit, and that he neglected such duty; and that there might be facts and circumstances in the case which would show that there was no such liability, either because there was no such duty, or that it had not been neglected. Therefore, in order to try what the real

facts were, the cause was set down for trial on the issue of fact, and in June came on to be tried, just three years after it was begun. It came on for trial on the pleadings, which, as the Court said, did not disclose the real facts and circumstances; and the very object of the trial was to ascertain what they were, and it came on for trial without either party being aware of the state of facts to be relied on by the other. The contrast, in this respect, between the Chancery pleadings in the case and those in the action at Common Law was most striking. In the former, the facts relied on by the plaintiff were set forth succinctly and clearly in order of time, and the answer stated; in like manner, and upon oath, the facts relied upon by the defendant, so that at once it could be seen whether any facts really were in dispute, and if so, what they were, and upon what points evidence would be required: whereas, in the action, the declaration merely stated a conclusion of negligence, and the plea denied it; and both parties came down to trial, neither knowing what was really the case of the other, or whether any facts were in dispute between them or not. The case in the action turned entirely on what had taken place between the plaintiff, as the client, and the defendant, as his attorney, in 1864, on which everything depended, of course, as to the alleged neglect. The examination and cross-examination of the plaintiff occupied several hours, in fact, the greater part of a day; and it was manifest, from the course it took, that the case in a great degree may depend upon facts and circumstances—many of them things said in conversations—which occurred eight years ago. The defendant's evidence supported the case, and the plaintiff's counsel, finding that the case was likely to go against him was glad to yield to a verdict for the defendant, with some conditions in his favour as to costs. Yet it might be that the plaintiff's hesitating expressions in reference to the observations imputed to him, more from their being so suddenly sprung upon him, than, in reality, he did not like to contradict them peremptorily without some reflection. And it is certain

that if the other party had been examined, as he would have been in Chancery, soon after the suit was instituted in 1866, both parties would have been in a fairer position and more likely to recollect the truth. But in any view the contrast between the Common Law system and the Chancery must be allowed to be very favourable to the latter. This case attracted the attention of Mr. Harcourt, and elicited from him these observations in the *Times* :—

“ This very morning my eye falls upon a cause being tried in the Guildhall, of which your law reporter gives the following particulars. The case began with a Chancery suit in 1866. ‘Owing to the crowded state of the cause lists in Chancery, the cause did not come for hearing till 1868. The case was appealed and decided with sufficient expedition. The certificate of the Chief Clerk could not be obtained till 1869. ‘Now, however,’ writes your reporter, ‘ensued the very usual result of a protracted litigation, that the party succeeding found that his success was fruitless, for in the meantime the defendant had become bankrupt, and afterwards died. The plaintiff then had to seek his remedy against another party. The action was commenced in 1869, three years ago. The pleadings were demurred to. Demurrers go into the Special Paper. There being only two or three Special Paper days in the Queen’s Bench in each Term, the case did not come on till January last.’ Thus it took two years to determine what question should be tried. And another elapsed before it could get to trial. The case is now being tried; when it will be finally concluded no one can even guess. Thus this unfortunate man has been more than six years steadily at work both in the Court of Chancery and the Courts of Law, and who can say when he will get out of either? It is to be hoped that his wealth and his patience are alike inexhaustible.”

It will have been seen that the ill-fated man was glad to compromise the matter. The case strongly illustrates the superiority of the Chancery system, and Mr. Harcourt went on to observe :

“ As far as I understand the matter, it appears that in respect of the despatch of judicial business the Court of Chancery is far in advance of the Courts of Common Law. This is simply due to its better organization. The Vice-Chancellors and the Master of the Rolls sit more continuously, and there is practically a Court of Appeal, in the shape of the Lords Justices, much more constantly at work.

And, for limited purposes of urgent necessity, the Court of Chancery professes to be always open. Indeed, with some modifications, I think the Court of Chancery offers a good model on the lines of which the Courts of Common Law may be reformed."

He added other very serious evils connected with this Court, to which it is very necessary that public attention should be directed, arising from the closing of the offices in the long vacation, and other similar causes, but these are very easily remedied. These are but blemishes on a good system, but that of Common Law is essentially erroneous. Innumerable illustrations of the truth of this could be adduced from the reports in the *Times*. Speaking generally, a suit in Chancery can be carried through its various stages of first instance, appeal, and final appeal, to the Lords in little more than a year. Thus, the case of *Wotherspoon v. Currie*, relating to the Glenfield Starch label, was heard by Vice-Chancellor Malins in February, 1870, it was heard by the Lords Justices on appeal in July, and it was finally decided in the Lords in April, 1871. Again, the case of *Clowes v. Hogg*, relating to *London Society*, was heard before the Vice-Chancellor in December, 1870, and was heard on appeal before the Lords Justices in February, 1871. Numerous and similar instances could be furnished during the last two or three years.

It is to be observed that there is this distinction between appellate jurisdiction in Chancery and at Common Law, that in Chancery a party may carry an appeal on a question of law before the case is heard in the evidence, or may carry on both proceedings simultaneously. At Common Law he cannot go into a Court of Error until he has tried the issues of fact; but in Equity it is otherwise. Thus, not long ago, this case occurred in Chancery, in which it will be seen that the Court of First Instance heard the case and granted relief while an appeal was pending on the law.* The plaintiff filed his bill for an injunction and for damages. The

* *Odit v. Forte*, before Vice-Chancellor Wickens, Michaelmas Sittings, 1872.

first question which was argued at length on the demurrer, was as to the validity at law of the covenant. The Vice-Chancellor held the covenant to be valid, and overruled the demurrer. The defendant appealed to the Lords Justices, who upheld the Vice-Chancellor's decision, and, as will be seen from the judgment, the case will now be heard by the House of Lords. The case now came before Vice-Chancellor Wickens on the hearing, and the question principally argued at the hearing, and in reference to which the defendant was cross-examined, was whether he was bound by notice of the covenant. From the evidence it appeared that when he had taken the contract from the agent of the society he had acted without the intervention of a solicitor, and had abstained from making any inquiry as to the title-deeds. The invalidity of the covenant was also insisted on. The Vice-Chancellor in giving judgment said that on the question of the validity of the covenant he was bound by the opinion of the Lords Justices that the covenant was good; nor had he any doubt in his own mind, though he did not consider it necessary for him to say so, that their decision was right. That being so, the case was hardly seriously arguable. There was one point to which he would refer to make a suggestion in the interest of both parties. It had been stated that the judgment on the demurrer would be brought before the House of Lords by way of appeal. His present decision would, of course, also be the subject of an appeal to the House of Lords, and he would suggest that, to save the expense of two separate appeals, both parties should agree to combine the appeal from both decisions in one case. Counsel on both sides thanked the Vice-Chancellor for the suggestion, and said that they should advise that it should be acted upon. The convenience of such an arrangement is obvious, but it could not have been possible at Common Law.

IV.—MICHAELMAS TERM AND SITTINGS.

THE proceedings of the Courts during the legal year which commenced Michaelmas Term, are of peculiar interest, because they are the last that will take place under the old judicial system. They are of interest, as affording an obvious opportunity of recording the proceedings of a legal year under the old system with a view to future review and comparison with the new judicial system about to be inaugurated. And on that account we propose to take advantage of this opportunity, and to present in a condensed form a review of the proceedings in all the Courts of Common Law and Equity, Probate and Admiralty, Divorce and Matrimony, Bankruptcy, and, lastly, the Ecclesiastical Courts and the Privy Council, including trials, and sittings *in banco*, courts of first instance and courts of appeal, so as to present at one view the actual working of the whole of our judicial system as it still exists.

This will be the best possible introduction to and accompaniment of a series of papers we propose to commence upon the operation of our new judicial system. Judgment, said Dugald Stewart, is the result of comparison, and the comparison of the new system with the old will be the best possible means of understanding the effect of the new. This, however, is not the only object to be attained by this review of the proceedings of the Courts during a Term and its attendant sittings, which we shall accompany by similar summaries of the business of the different Circuits at every Assize. The nature, character, and amount of judicial business, civil or criminal, will thus be presented at one view to the mind; and opportunity will be afforded of noticing cases of particular interest on account of the novelty or nature of the legal questions or principles involved. And occasionally the reports will be supplemented by special reports of cases of importance unreported or imperfectly reported. Particular attention, moreover, will be directed to

such cases as illustrate the nature of different jurisdictions, or of different modes of procedure, or the operation of rules of practice. And thus these papers will afford the only means of surveying, so to speak, the whole field of our judicial system, vast and varied as it is, as a whole, on one view, as it is exhibited in actual working and operation. It is only in this way that we can be prepared for the operation of a new system which is to embrace the whole of these various courts of jurisdictions and to combine in one consistent system parts of various methods of procedure. In presenting these illustrations of our judicial system as it is its anomalies will be unavoidably exhibited, and one of them occurs at the very outset in commencing the review of the proceedings of a Term, and it is this. Naturally, in the arrangements of the courts, the higher courts, the tribunals of appeal would be taken first, but during Term, at Common Law, no Courts of Error are sitting, and so they must, to preserve the order of time, be postponed to the last.

The Judicial Committee of the Privy Council demands the first and highest place, as the most ancient, the most excellent, and the most extensive in its jurisdiction of any of our Tribunals. Constituted as it is of the most eminent and experienced judges, and the ablest jurists of the country, and forming the Supreme Imperial Courts, it is the model of the Court of Appeal which is to be formed under the new judicial system, (adding to it a greater degree of permanence), and it is, therefore, of the highest interest. During the recent sittings, the members who usually sat were Sir J. Colville, Sir Baron Peacock, Sir Montagu Smith, Sir R. Collier, and Sir Lawrence Peel; but Lord Penzance sat in several cases. The committee resumed their sitting on the 4th of November, after the Long Vacation, with a list of twenty-three appeals and two patent cases. The first cases taken were petitions for the extension of patents, in which this committee exercises a kind of function, not exactly judicial, but like that originally exercised by the King's Counsel in advising grants, to which it would then be the

duty of the Chancellor to affix the seal. The validity of the English patents is determined in the courts of Law and Equity. This very term, the Court of Appeal in Chancery had to determine on the validity of a patent, with reference to novelty, and held it invalid (*Smith v. Buller*). Of course, as to the judicial appeals, most of them, as usual, were from India. Last Term an important appeal from the Isle of Man was heard at these sittings before a strong committee, consisting of Lord Penzance, Sir J. Colville, Sir M. Smith, and Sir R. Collier, on January, 1871. The plaintiffs had filed their bill in the Court of Chancery of the Island, complaining that operations of a mining Company had dried up their water springs, and in February, 1871, the court granted an injunction restraining the company from working their mines until they had deposited a large sum of money to meet claims for damages. The company, by their answer, denied that their works had caused the spring to be dried up, and also denied their liability, relying on the case of *Chasemore v. Richards*, in the House of Lords, which decided that such damage was too remote to found a legal claim. In June, 1871, the court decided in favour of the plaintiffs, directing an issue to ascertain the damage done, and meantime continuing the injunction. The mining company appealed, and urged that the Court of Chancery in England would not have granted such an injunction. It would, perhaps, be better if an Equity Judge had been on the committee, but the substratum of the case, no doubt, was a legal right. It proved a case of some difficulty, and the committee took time to form their opinion thereon. In the result they reversed the decree as to the injunction.

Most of the appeals to the Privy Council are from India, and they are of great variety and often of great magnitude. One case was heard at these sittings which had been pending 15 years, and involved property worth an enormous sum. The original judgment given in 1860, by the principal, Sudder Ameer, that is a native provincial judge, and in 1863 the High Court of Calcutta affirmed the judgment. In

the meantime some of the parties had died, and others were added, and there were several revivals of the suit, and owing to heavy arrears there had been considerable delay in this court. Consequently the appeal was only heard at those sittings. Sir Barnes Peacock, in delivering the judgment of the committee, said :—

“The rule on which their Lordships usually acted was not to overturn the decision of the Lower Court when that decision had been affirmed by the High Court, and in this case there was nothing to take the appeal out of the ordinary course of the Committee. Their Lordships would, therefore, advise Her Majesty that the judgment of the High Court be affirmed, with the costs of the present appeal.”

In another case from Bengal the Decree of the High Court was affirmed. There seems to be terrible delay in these appeals. Thus one case there had been pending 12 years. In another case from Bengal the Decree appealed from was in 1869, and the original Decree in the case was as far back as 1864. In two cases from Oude the appeals were from a decision of the Commissioners, there being no regular judicature, and his Decrees were reversed, the Committee holding that the lower tribunal in each instance was right, and the superior tribunal wrong. In another of the Privy Council cases the appeal was from a Decree of the Divisional Bench of the High Court at Calcutta, given in 1870, which dismissed the suit instituted in the Lower Court. The committee affirmed the Decree of the High Court. In another case the litigation had been pending for several years, the decision of the Zillah or Provincial Court was given in 1859, and the judgment of the High Court of Calcutta, reversing that Decree, was pronounced in 1862. This appeal was now argued in November, 1873, and the committee reversed the judgment of the High Court, and affirmed that of the Provincial Court (*Tirey v. Rose*, November 22nd). In another case the appeal was from a Decree of the High Court, given in March, 1869, reversing an order of the superior judge in the preceding year. The committee reversed the Decree of the High

Court, and affirmed that of the Court below; and it is remarkable in how many cases this occurs, that the Judicial Committee prefer the decisions of the inferior court.

Appeals are to the Privy Council from all our colonies and from our great colonial possessions, America and Australia, appeals are constantly coming. During the last sittings an important appeal was heard from Australia, in a great case between an Australian Land Company and the Government of South Australia, arising out of a purchase of land from that Government by the Company. The case was heard before Lord Penzance, Sir J. Colville, Sir B. Peacock, Sir M. Smith, and Sir R. Collier. The action was founded on an alleged contract with the Company by the Government to allot them so many lots of land, which the Government had failed to do. They denied their liability on contract, and also contended that the remedy, if any, was by Petition of Right. The Supreme Court, however, gave judgment against them, and the Privy Council affirmed the judgment, which was for nearly £34,000 damages.

The Court of Chancery.—It is the peculiar feature of this court that its judges sit separately as judges of first instance, yet form one court; two others sitting only as judges of appeal, the Chancellor the head of the court, capable of sitting either with them as a full court of appeal, or as a judge of first instance. Thus, it is infinitely more elastic and effective in the constitution of its judicature than the Courts of Common Law, and it affords a model of what the new judicial system will be, and, probably, was the model on which Lord Selborne, all his life accustomed to the Court of Chancery, though latterly well acquainted with the courts of law, framed his measure for the construction of the new system. This characteristic feature of the court is indicated expressively, though, probably, to most persons unobservedly, on the first day of Term, by all the judges of the court taking their seats *pro forma* with the Chancellor. Thus it was that on the first day of last Term—

“The Lord Chancellor, attended by Lord Justice Mellish,

Sir George Jessel (the new Master of the Rolls), the Vice-Chancellors, Sir R. Malins and Sir James Bacon, entered the court at Westminster and took their seats."

And then the judges went off each to his own court, or rather division of the High Court, the whole constituting one united Court, with separate powers of sitting, and different judges for first instance and appellate business; advantages all lost in the Common Law system, where the courts are separate, and the judges of one court cannot act in another, except on matters of practice, or in the trial of causes, or voluntarily assisting the judges of another court under Lord Hatherley's Judges Jurisdiction Act of 1870; and all the judges indiscriminately act as judges of first instance and of appeal; one consequence of this is that the Court of Error in the Exchequer Chamber cannot sit at all until Term is over and the courts of law have risen, and then can only sit for a few days at a time, the judges being soon wanted again for sittings at *Nisi Prius*, or *in Banco* after Term, or at the assizes, or the Central Criminal Court, and thus both first instance business and appellate business are delayed, whereas, in Chancery, there being separate sets of judges for each kind of business, both kinds of business go on uninterruptedly without check or interruption. Thus, in the hearing of Chancery appeals, there is no delay, and a cause is heard and decided on appeal within a few months. Hence at the opening of last Term there were only six appeals and twelve appeal motions before the Lord Chancellor and Lords Justices, all of which were heard and disposed of without delay. There were nearly 600 causes to be heard, exclusive of demurrers and other matters. The causes standing for hearing were as follows:—Rolls' Court, 160; Vice-Chancellor Malins, 155; before Vice-Chancellor Bacon, 120; and in the book of the late Vice-Chancellor Wickens, 154. At Common Law the arrears were not considerable, but the new trial list was increased by applications arising from the Summer Circuits. The Divorce Court opened with a list of 185 causes, against 167 at the commencement of the

previous Term. As regards the Courts of Common Law, the comparative amount of business is to be measured of course, not only by the number of cases *in Banco*, but the number of actions entered for trial in each of the three courts, which is always considerable for the sittings on and after Term, say, on an average, at least 150, making, altogether, 450 or 500 cases, certainly not above 600. These are only the cases for trial, which is not, like a hearing in Equity, final, but usually is not so, and generally gives rise to subsequent hearing *in Banco*.

The *Law Times* thus stated the amount of business *in Banco* :—

“The present state of business in the Common Law Courts is as follows : In the Queen’s Bench there are fifty-one cases for argument in the new trial paper, the first case having been moved just a year ago, and being part heard. In the special paper in the same court one case stands for judgment and thirty-two for argument. In the enlarged rule paper there is one case for argument. In the Crown paper there are forty-six cases for argument. In the Court of Common Pleas new trial paper there are twenty-five cases, and twenty-one cases in the special paper. In the Court of Exchequer there are seven cases in the new trial papers and fifteen cases in the special paper. The Court of Exchequer Chamber will sit after Term. There are five appeals from the Queen’s Bench ; from the Common Pleas seven for argument and one for judgment ; and from the Court of Exchequer, two for argument and two for judgment. The Court of Criminal Appeal will sit on Saturday’s Term.”

So much for a general comparative view of the amount of business in the Court of Chancery and Common Law with their relative judicial strength. It is to be observed that the courts of law are strong enough with six judges in each, to have a full court *in Banco*, constituted of three or four judges, with a judge constantly sitting at Chambers, and another constantly sitting at Nisi Prius, whereas the four judges of first instance in Chancery can each only sit in court to hear causes or demurrers, and must postpone the Chamber business until the end of the judicial day, when worn and wearied by Court work. It may be conceived, with such an immense amount of judicial business to be disposed of, with

what consternation the Equity part of the profession must have heard of an intention not to fill up the vacant Vice-Chancellorship, with a list of nearly 160 causes to be heard in that Court. Lord Selborne, with a laudable anxiety to do his best to supply a deficiency, issued the following notice :—

“ In consequence of the lamented death of Vice-Chancellor, Sir John Wickens, and to make provision for the hearing of some urgent applications in the causes and matters which, at the time of his death, were attached to his Court, the Lord Chancellor has directed that until the successor to the late Vice-Chancellor shall be appointed, applications in any causes or matters so attached may be made to his Lordship personally.”

But, at the same time, the Lord Chancellor announced that he should sit in the Court of Appeal every day throughout Term, and that “ he would, except on Saturdays, during Term, usually sit in full Court with the Lord Justices of the Court of Appeal.” Even a Lord Chancellor cannot be ubiquitous, and of course every day he sat for a Vice-Chancellor, he was absent from his Court of Appeal. However, happily after a few days, Lord Selborne announced that a new Vice-Chancellor would be appointed, and the consternation excited in the Courts of Equity was allayed. Half the Term, however, elapsed before the new Vice-Chancellor took his seat, and in the meantime Lord Selborne was indefatigable, now sitting as a judge of first instance, now a judge of appeal, and certainly no Chancellor worked harder or more conscientiously. He sat every day somewhere, and as far as he could he applied himself to the duties of the Court of appeal, where he and Lords Justices James and Mellish constituted a splendid appellate tribunal. It was only when he was engaged in sitting for the Vice-Chancellor that the Lords Justices sat without him in the Court of Appeal. It has always been his opinion, in accordance with the intention of the Act constituting the Court of Appeal in Chancery, that the Court should be held as often as possible as a full Court, composed of the Chancellor and both the Lord Justices; and no doubt that will be the

ordinary number of a Court of Appeal under the new system.

The Court of Appeal in Chancery, during the last Term, was, as Lord Selborne had contended, usually constituted of himself, the Lord Chancellor, and both the two Lords Justices, though once he sat with one of them, and the two Lord Justices also sat by themselves. The cases brought before the full Court of Appeal were chiefly company cases, and it is most, remarkable how large a proportion of Equity business belongs to that class of cases, especially contributory cases. The first case heard before the full court constituted by the Lord Chancellor and the two Lord Justices, was the case of the *Bank of Hindustan*, raised, as the Lord Chancellor observed, a question as to the power of companies to bind their shareholders, the importance of which may possibly extend much beyond the particular case and the particular company. The case had been in litigation at law and equity for a series of years, ever since 1866, and it afforded an illustration of the practical operation of our judicial system, with its separation of courts, and differences of jurisdiction, and consequent tendency to confusion and error. The case had arisen out of an arrangement between two companies as long ago as 1864, which gave rise to a suit in Equity. The late Vice-Chancellor Giffard gave a decision which was not followed by evidence, and was misunderstood by the courts of law, when further litigation ensued, and a court of law held the parties sued for calls not legally shareholders, and so not so liable to the calls (*Bank of Hindustan v. Alison*, 6 L. R. C. V. p. 54.) The decision in February, 1871, was affirmed in the Exchequer Chamber, *ibid* 222, and thereupon one of the parties applied to the late Vice-Chancellor Wickens to order the money he had already paid to be returned to him, and two other shareholders made similar applications. The late Vice-Chancellor Wickens, in June last, made the order in the latter two cases, and Lord Justice James, sitting for him, made a similar order in the other case, that of *Alison*. The company appealed, and the appeal was now argued. The court, without hearing counsel

on the part of Alison, decided in his favour, on the ground that the company having sued at law were bound by the decision, but in the other two cases they decided in favour of the company, holding them liable, as contributaries, and reversing the order of the Vice-Chancellor. The Lord Chancellor, in an elaborate judgment, declared that the court did not deem themselves bound by the decision of the Court of Error, as it proceeded on an incorrect statement of the effect of the decision of Vice-Chancellor Giffard, and that the Court considered the new shares were legally created (case of the Hindustan Bank). Two other appeals in contributory cases were heard and decided by the Lord Chancellor and the two Lords Justices. In one case, that of the *Metropolitan Carriage Company*, the Court held, reversing an order of the late Vice-Chancellor, that an assent by a person, at the instance of one of the promoters to act as a director, on a promise by the promoter to give him the necessary qualification, did not make it requisite that any contract should be entered into with the company, as he might obtain shares in some manner, not of necessity as their original holder: that it could not be inferred from the mere fact that he assented to his appointment as director, that he had entered into a contract with the company to take the amount of shares necessary for his qualification: and that the evidence went to show that he intended to qualify himself by the shares which were actually registered to his name and allotted to him as nominee (*Brown's Case*). The Master of the Rolls had a few days ago held otherwise in the case of one of the original promoters, who were bound by the Act to have as a qualification a certain number of shares held in his own right (*The Wiltshire Railway Company: Seymour's Case*). In another similar case, the full Court of Appeal held that money due from the company might be set off against the sum due on the shares the directors was bound to take, that being the obvious intention of the parties (*The Matlock and Bath Hydropathic Company: Maynard's Case*).

The Lord Chancellor sat, with Lord Justice Mellish, as Court of Appeal in Bankruptcy, and set aside two orders made by Registrars sitting as Chief Judge, a practice more than once animadverted upon by the Judges of Appeal. In one of these cases the debtor, after a deed of inspectorship, which provided that his estate should be administered as in bankruptcy, received a large sum of money coming to him under an agreement to which he was not a party, and "which vested in him" (the court said) "no right either at law or equity." The registrar held the creditor entitled to the money, either as an interest vested in him at the time of the deed, or as a future interest; but the Court held that on neither ground were the creditors entitled, the deed being in the ordinary form, merely vesting his estate and effects, *i.e.*, as they thought, his existing estate and effects. (*Ex parte Perry*). In the other case a banker had remitted a bill by post, and after it was posted, and before it was sent out, finding that the consideration failed, he applied to the post office to obtain it back, and would have obtained it but for a mistake by a clerk, in consequence of which it reached the remittee, who failed next day. The registrar refused to order his assignees to return the bill; the Court held that it ought to be returned for, said the Lord Chancellor, there was a power, and an intention to reclaim the letter, and everything that could be done was done to reclaim it. And Lord Justice Mellish concurred. "The property in the bill was not changed merely by writing an endorsement on it and by an inchoate act of delivery; until actual delivery it could be recalled." (*Ex parte Cote*). Many cases at law support this view. See *Marston v. Hall*, 8 M. and W.

A remarkable case arose under the Church Discipline Act, which came before the Court of Chancery, on an application for a prohibition against the Bishop, illustrating more than one part of our judicial system. The Bishop had issued a commission, at the instance of a layman, though a caveat had been filed in the Consistory Court and without hearing the opponent, who opposed on the ground of some

objection to the fitness of the promoter. Term was over, and the Courts of Law were not sitting, so the application for a writ of prohibition was made to the Court of Chancery, which is always open, and whose sittings are not suspended by the antiquated absurdities of Terms. The application was made to one of the Vice-Chancellors (Bacon), who dismissed it as entirely untenable. The next day an appeal motion was heard before the Lord Chancellor and Lord Justice Mellish, a striking illustration of the speed with which appeals can be heard in Chancery owing to the constitution of its judicature in two distinct orders, original and appellate, and the continuing of its sittings. The Court without hesitation adopted the view of the Vice-Chancellor that the Bishop was not bound to hear the opposition, and they dismissed the petition of appeal. (*Ex parte the Rev. John Edwards, Vicar of Prestbury, Gloucestershire.*) Accordingly the Commission sat, and found that there were sufficient grounds for a proceeding, for some alleged ecclesiastical irregularity in violation of the rubrics. There can be no doubt that there will be a great many more of these proceedings promoted by laymen disposed to quarrel with their incumbents, and that there will be a vast deal of ecclesiastical litigation of this kind.

Before the Lords Justices of Appeal, a case occurred in which there was an excellent illustration of the application of the power of *viva voce* cross-examination. The question was as to the right of a partner to keep property claimed by bankers under a mortgage by the partner for his separate debt. Their written answer declared that they had knowledge that the property was partnership property, a fact on which the question of priority depended. The Vice-Chancellor had held that they were not affected with knowledge, and that, therefore, they were entitled to priority. The Lords Justices had them orally examined before the court, and they then admitted that they knew at the time of the mortgage that the premises were in the occupation of the partnership and that the business was carried on there. And the Lords Justices

were of opinion that this evidence displaced the grounds of the Vice-Chancellor's decision, because the bankers had notice of a fact which should have put them on inquiry, and that they were, therefore, entitled to priority, so they reversed the decision (*Cavander v. Bulleel*). A case occurred which will be a "leading case" on the legal effect of lunacy and in which Lord Justice James delivered a masterly judgment containing a copious and interesting exposition of the law on the subject. A bill had been filed in the name of a person of unsound mind, not so found by inquisition, by a person professing to be his next friend, but really appointed by the solicitor who filed the bill, and which was filed really on behalf of a person accountable to the estate, and against whom the bill was filed, in order to have the accounts taken, and so obtain his discharge. After a decree thus obtained, there was a petition in lunacy, and when the committee was appointed, he discovered the proceedings in the suit, and a petition was presented by him to have them set aside, and though the Vice-Chancellor made only a modified order, the Lord Justices held the whole proceedings, beyond the mere appointment of a receiver, irregular and improper, and set them aside (*Beall v. Smith*).

Many important points of procedure have been illustrated and mooted before the Chancery judges, in the course of the recent sittings. The Lords Justices, as already mentioned, tested the benefits of oral examination in open court on a question of disputed fact. Vice-Chancellor Bacon declined to send to a jury a claim of damages for breach of contract, saying that the ordinary practice of the court was sufficient, and that there was no reason or necessity for invoking the aid of a jury nor any need of stopping the usual business of the court by hearing evidence *vivâ voce* (*re. Lafitte and Co.*, December 6). Vice-Chancellor Malins took a similar course in a case in which, though there was a question of fact, it did not appear to require trial by jury. The Master of the Rolls described a large class of cases in equity, when he said that in the case

before him there was no controversy as to the facts of the case, and the mass of evidence which had been filed on both sides went only to the opinions of the witnesses and their inferences from the facts (*Attorney-General v. Terry*, December 11). In another case, however, in which the question was as to nuisance arising from a steam engine, witnesses were examined *vivâ voce*. His Honour took notes of the evidence so far as he thought it material, and said he should be prepared to send his notes, if necessary, to a court of appeal (*Beasley v. Brierly*, December 16). Thus, the Equity judges in fitting cases have no difficulty in hearing a case on *vivâ voce* evidence, as the judge in the Court of Probate and Divorce does, without the delay and incumbrance of a jury ; while, at the same time they perfectly well know that there are cases which require a trial by jury, though they also know that in equity these are comparatively rare.

Sir George Jessel, the new Master of the Rolls, took his seat the first day of Term. Many company cases came before him, chiefly contributory cases, or applications to wind up. In one of these, three Shareholders' petitions had been presented for winding up the Company, which was already in voluntary liquidation, and His Honour, in deference to the wishes of the majority, made an order for winding up under supervision. (*The Australian Agency Corporation*.) In another case, His Honour, on the authority of a similar case before the Lord-Chancellor (in the *New Zealand Company*, 21, *Weekly Reporter*, 782 made an order to take the names of applicants out of the register, on the ground that the shares were not duly issued, in consequence of an omission to file contract with the Registrar. (*Harwood's Machine Company Works*.) In the case of a Company's above act, required that the original Directors should each possess in his own right in certain number of shares as a qualification, his Honour held that they were not satisfied by merely nominally taking paid up shares issued gratuitously, but that they each must take so many unpaid shares, and that they were liable to calls thereon as Shareholders. (*The*

Wiltshire Railway Company, Seymour's case.) In a case where he was asked to restrain a railway company from entering in possession of land they had taken under notice to treat, which had not been carried out and which it was insisted, had dropped, as their compulsory powers had expired, and the capital had not really been subscribed, though there was the certificate of it required by statute :—

“The Master of the Rolls said it was settled that the Court had jurisdiction to restrain a company from misusing Parliamentary powers, but ought not to exercise its jurisdiction except in a very clear case, as there was a remedy at law by action of trespass or ejectment. The question, therefore, was whether it was very clearly shown that the company had exceeded their powers, and in this case, as the time had been extended under a new Act, he thought it was not shown, and as to the capital, the certificate, apart from fraud, was conclusive.” (*The Iron Company v. the Neath Railway Company.*)

There was a case of the breach of an agreement to sell all the coal of a particular seam, in a coal mine in which, as the agreement was of such a nature that a decree for specific performance could not be made, the bill prayed for an injunction to restrain the defendants from supplying other persons with the coals. The defendants demurred to the bill, and the Master of the Rolls held that it could not be sustained, as it was a mere breach of contract, which could be compensated in damages, to be assessed by a jury, and he denied emphatically that for his part, he had never been able to understand why the court refused in certain cases to decree specific performance because an agreement was difficult to enforce, yet attempted to arrive at the same result, only in a roundabout manner, by granting an injunction. (*Fothergill v. Rowland.*)

There were several cases illustrative of the equitable doctrine of trusts. One was as to the doctrine of what are called “resulting trusts,” that is, trusts failing, or voluntary, and revoked, and resulting in an implied trust for the real owner. The plaintiff had transferred stock into the names of himself and his mistress, and now filed a bill to compel her to join in a re-transfer, which she was decreed to do.

"The Master of the Rolls said he was obliged to give the plaintiff a decree. Probably, he had meant to make some provision for the defendant; but the law said, whatever common sense might say, that when a man transfers stock into the joint names of himself and his mistress, there was by implication a resulting trust in favour of himself. The evidence did not rebut this implication, and there must consequently be a decree for the plaintiff."

In another case a man filed a bill to recover a sum of money which his deceased wife had deposited with the defendant, who at first denied it, and then said it was in gratitude or remuneration for kindness shown to her when she lodged in his house, but

"The Master of the Rolls said he could not, under all the circumstances, come to any other conclusion than that the defendant had constituted himself an express trustee of the sum in question. But even if he were a mere bailee, the refusal to account would give the court jurisdiction. The defendant's story that the lady gave the money to him as a present was uncorroborated and improbable. But whether the story were likely or not, the court would never allow a man, whether bailee or trustee, to discharge himself of an obligation by his unsupported oath after the death of the bailor or *cestui que* trust. There must be a decree for payment with interest."—*Fortune v. Thompson*.

It is curious that twenty years ago there was an action at law by a husband under similar circumstances, and there also, he recovered, on the strictly legal ground that the money was legally his, and availed in law to his use.—*Bird v. Pegrum* 13 C. B. rep. 639. The cases cited there were both legal and equitable. The law and the equity are identical, and these cases appear to belong to that large class in which the legal and equitable jurisdiction are concurrent, and the equitable remedy was only resorted to on account of the advantage of a discovery—an advantage now equally attainable at law by interrogatory.

The Master of the Rolls decided an instructive case as to constructive notice of prior incumbrances and its consequent priority. A debtor had made an equitable mortgage to his bankers—that is a deposit of deeds—with an undertaking to execute a legal mortgage when called upon to do so. Afterwards he executed a legal settlement, and trustee, and

cestui que trust had no actual notice of the deposit, but the attorney having asked after the deeds, was told they were deposited at the bank for safe custody, and made no further enquiry. The Master of the Rolls said it was a clear case of constructive notice. It was the duty of the solicitor to inquire at the bank respecting the deeds in their custody. Had he inquired, he would have learnt that the deeds were deposited there by way of equitable mortgage. There must, therefore, be a decree for the plaintiff. He had preferred deciding the case on the ground of constructive notice, but, if it had been necessary, he should have been disposed to hold that a man who enters into a contract to execute a legal mortgage when required, cannot squeeze out the other party by entering into another contract with a subsequent purchaser for value.—*Maxfield v. Buxton.*

(To be continued.)

V.—THE CASE OF THE VIRGINIUS.

THE case of the *Virginus* was of equal interest in England and America. The crew comprised English as well as American subjects, and English subjects were among those who were summarily executed. One would have thought the summary execution of men who were going to assist the insurgents would have raised a stronger feeling in this country than in any others, since we have always prided ourselves for our sympathy with those who are struggling for independence, and sympathizers have so often left our shores. Yet it is impossible not to have seen that the tone of public opinion was far more clear and prompt, and the tone of public feeling far stronger in America than in this country. Partly, this was, no doubt, owing to the superior knowledge of Americans in matters of international law. Thirty years ago Sir John Taylor Coleridge, in writing to Story, remarked that "the position of the Constitution of the United States forced the study of inter-

national law upon the Americans, and gave them a great advantage in that respect over lawyers in this country. The fact appears to be undoubted, and it was illustrated in the vague and erroneous ideas which were found to exist in this country as to piracy. There is a popular impression that those who aid the insurgents of other nations are pirates, and that being pirates they may be seized and summarily executed whenever they can be found. This impression is the result, partly of a reaction from former errors of an opposite character, and partly of the loose language of historical or political writers, of popular discussions, and parliamentary debates. At one time those who aided foreign insurgents were considered as heroes who assisted patriots, but in our own times there has been a disposition to denounce them as pirates. Such volunteers are not necessarily heroes, but neither are they necessarily adventurers, pirates, or buccaneers. It depends upon circumstances whether they approach more nearly to the one kind of character or the other. However pure their motives may be it does not follow that their conduct is laudable or even lawful; but there are many degrees of culpability, and the character of these acts turns solely on the motives and object. If the object is political, then, though the act is unlawful, yet it is not piratical. But if the object is piratical, then, and not otherwise, the act is piracy. But piracy is robbery, It is robbery on the high seas, and the object of robbery is personal gain and plunder. Therefore, it is only those who make political sympathies the cloak and cover for personal plunder, who are guilty of piracy, or can be treated as pirates. And even as to these, they are as much entitled to trial as other robbers, and men can no more be summarily executed on the charge of piracy, than robbery, neither can criminals be captured by one nation in the territory of another, nor in the ships of another nation, or on the high seas. This has long been a settled principle of international law. In general, as Vattel lays down, the criminal justice of each nation ought in general to be con-

lined to the punishment of crimes committed within their own territories, except as to those who, by the character and frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Thus pirates or incendiaries by profession may be exterminated wherever they are seized, for they attack and injure all nations, and thus they are brought to justice by the first nation into whose hands they fall, it being, however, he is careful to add, proper to convict the guilty, and to try them according to form of law. (Book i. c. 19, s. 232). Hence it appears plainly that it is only pirates by profession, those who practice depredation on all nations generally, who can be seized on the seas by the subjects of any nation, and that when they are seized they must still be brought to a regular trial, in order that their guilt may be legally established. Not a word can be found in Vattel or any other authority of international law in favour of the notion that even insurgents are pirates, and that pirates when taken in actual conflict can be summarily executed.

That there should have been any notion in this country that the voluntary assistants of insurgents were pirates, shows how great, in spite of Blackstone's Commentaries, is the ignorance which exists, even among educated men, in this country, on legal subjects. The great commentator, writing a century ago, observed :—

“Offences against the law of nations can rarely be the object of the criminal law of any particular State, for they are principally incident to whole states or nations in which case recourse can only be had to war. But where the individuals of any State violate the general law, it is the duty of the Government under which they live, to punish them with becoming severity, that peace may be maintained. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender by the State to which he belongs, and if that be refused or neglected, then the Sovereign avows himself an accomplice or abettor of his subjects, crimes, and draws upon his community the calamities of war.”—Blackstone's Commentaries, vol. IV., p. 18.

The only offence against the law of nations which Black-

one mentions as punishable, criminally, by the Courts of all nations, is that of piracy, which he thus defines:—

“The crime of piracy or depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. Therefore, every community has a right, by the right of self-defence, to inflict punishment upon him, what everyone would in a state of nature have been otherwise entitled to do.”

That is, in self-defence; if attacked upon the high seas, of course the subjects of nations may slay the pirates, or they may arrest and try them by regular course of law, and by our common law aliens could be tried for piracy, but then they could only be regularly tried for piracy as for robbing; unless slain in self-defence they must have been so tried.

“The offence of piracy by common law, consists in those acts of robbing and depredation upon the high seas, which if committed on land would have amounted to piracy there. And of course would equally require a regular trial.”

The municipal law of any State might create a different species of piracy, but only for the subjects of that State. Thus Blackstone mentions several of such statutes, all of which apply to subjects. And thus by a statute of George II, c. 18, and George II, c. 32., any natural-born subject, or denizen who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate. But then this would only apply in time of war, and only in time of war would any cruisers be entitled by the law of nations to search foreign vessels for our subjects, in order to seize them, either as offenders under this statute, or as deserters; that is, they could only be taken on board the vessels of other countries when the vessels themselves might be captured—that is, in time of war. In the reign of George II, also, statutes were passed making it penal for subjects to enter into any foreign service, which no doubt was aimed at the service of the Pretender; but this again was open to the same observation; it applied only to subjects, it created no offence against the law of nations, and it could

not authorize seizure of our subjects on board foreign vessels, except in time of war.

The principles of international law on the subject of the right of search in time of war was thus laid down, at the beginning of the century by Lord Stowell :—

“ That the right of visiting and searching merchant ships upon the high seas, whatever be the cargoes or destination, is the right of the lawfully commissioned cruisers of a belligerent nation ; that the penalty for the violent contravention of this right is confiscation of the property, and that articles tending, probably, to aid one of the belligerents, as arms, ammunition, &c., are contraband of war, and are liable to seizure by the vessels of the other party.”—4 Robinson's Rep., 1350, i. ch. 10.

That is, that the only right, even in time of war, is a right of search and seizure of contraband of war, which, of course, includes the right of making prisoners of enemies, but if they are enemies and not subjects, only as prisoners of war ; for it is a belligerent right, subject to the laws of war. The notion that persons who aid the insurgents of other countries, not with the object of depredation, but from a desire to assist them, are pirates, is one of the most monstrous that was ever conceived ; and as, on the one hand, it outrages common sense and humanity, so it is utterly opposed to the history of the subject. By municipal law it had been made felony by several statutes (4 Geo. 2, and 29 Geo. 2) to seduce subjects of this country to enlist in the service of foreign powers, enactments which probably were originally aimed at the service of the Pretender, and which were so opposed to the ideas and feelings of modern times, that when, in the early part of the century, the enlistment of forces to assist the insurgents in the Spanish colonies was carried to a great extent in this country, it was doubted whether the old statutes were sufficient to enable the Government to suppress the practice, and in 1819 a new Foreign Enlistment Act was proposed, chiefly in consequence of our express engagements with Spain by treaty not to allow succour to be supplied to the insurgents.

Now if the practice were piracy, there would be no necessity either for statutes, on one hand or treaties on the other, for piracy may be punished as such by the courts of any country, and on the subjects of any country, as it is an offence against all nations. But as there is not, in such cases, any danger of depredation at all, still less of general depredation, it was felt to be impossible to treat the offence as piracy, and therefore it was provided for, in municipal law, by statutes, making it a misdemeanour and in international law, by the right of capture and forfeiture, as well as by the right of self-defence, in every State accompanied, by the exercise of martial law, in its own territory. Hence, in 1818, the American Enlistment Act, and next year, the English Enlistment Act. In the debates on the latter Act in our Parliament, it was not pretended that it was based on any general principles which rendered such acts criminal, and it was, on the contrary, declared without contradiction, that for four centuries there had been no period in which British subjects were not engaged in giving succour as individuals to other States, and no instance could be shown in which Government interfered. .

So strong, too, was the national feeling in favour of assistance to insurgents engaged in struggles for political independence, that the act became a dead letter. The embarkation of troops and stores continued for their assistance, went on without intermission until the struggle was ended, by the separation of the Spanish Colonies in America, and their acquisition of independence. Mr. Alison may be morally right, and no doubt is so, in arguing that this conduct was criminal, and a violation of the law of nations; but this may be conceded without any approach to an admission of the monstrous notion that it necessarily, and *per se* amounted to piracy. No doubt, in particular cases it might be so, when political struggles and civil war were merely taken advantage of and made the pretext for private depredations; but that would be in any particular case, a matter of proof, and would entirely alter the nature and character of the acts in question. And it is remarkable that when in the course of the debates

on the subject in 1819 of piracy, arguments were pressed most strongly against such intervention; it was obviously only applicable to it when patriotism was made the pretext for private depredation.

"Such a species of hostility is war in its worst form, for it is war without its direction or its object. It is not national hostility directed to public purposes, but private piracy aiming at nothing but individual plunder."

Of course, when the only object is individual plunder, it is private piracy, but this very language implies that it is otherwise when the object is not individual plunder, but political sympathy. And when it was added :

"Can we permit armaments to be fitted out in this country to attack the peaceable colonies of another, or to aid its insurgents from severing themselves from its dominions?"

The negative answer, and the most emphatic condemnation of the practice, stops far short of an implication that it is to be confounded with the crime of piracy.

That it is only international piracy or belligerency, which (apart from treaty) can justify the search and capture of a vessel bearing the flag of another nationality, was illustrated in the strongest way by the cases as to the slave trade. This atrocious traffic had been abolished and branded with infamy, by the most civilized nations of the world; and yet, as there was a doubt whether it could be deemed piracy by international law, there was a doubt whether the vessels of one nation could stop, search, and capture the vessels of another engaged in the traffic. In 1822, Chief Justice Story, in the case of a vessel carrying the French flag and papers, and captured by an American cruiser, as a slaver, delivered a charge in which he vindicated the capture on the grounds that the slave trade was piracy (Case of *La Jeune Eugène*, 2 Mason's Reports, 90) but his view, though enforced by unanswerable arguments, and confirmed by a decision of Sir W. Grant, (the *Amadie*, 1, Dodson's Reports, 84) was not adopted by the Supreme Court,—(The *Antélope*, 10 Wheaton's Reports, 211) now by the Courts of this country,—(The *Louis*, 2 Dodson's

Reports, 210)—(*Madrazo v. Willis*, 3 B. and Ald. 354.) And Stowell differed from Story in this point.

But the important point to be observed is that all concurred in desiring that the slave trade should be declared piracy, for the reason that then, and not until then, would the vessel of any nation have a right to stop, search, and capture the vessels of another for being concerned in the traffic. Thus, Story wrote to Lord Stowell:—

“Nothing effectual can be done except by the general co-operation of all nations declaring it piracy punishable by all; and so giving a limited right of search to all lawful cruisers to examine and capture all vessels found in places or latitudes where the trade is carried on. (Story’s Life, vol. i., 357.)”

That is, as the whole letter plainly implies, piracy alone could, in a state of peace, justify the exercise of such a right, and piracy in this sense means piracy by international law, and that any new species of piracy could only be created by the general consent of nations. Hence it was that Lord Brougham, echoing the words of Story, was always demanding that the slave trade should be declared piracy. But the difficulty was that this could only be done by the general consent of all nations.

In 1837, on the occasion of the rebellion in Canada, the question received a practical illustration. The American “sympathisers” mustered strongly on the frontiers, and had their head quarters on an island within the British territory. Of this island a body of armed Americans took possession, made it a dépôt of arms, and planted a gun on it, with which they cannonaded the British side, only 600 yards distant. They drew their supplies from the American shore, by means of a small steamer called the *Caroline*, which plied between the island and the opposite shore. The British Commander resolved to destroy her, and sent a party across the river for the purpose. She was moored on the American side, and therefore the assailants had to go on American territory; a conflict ensued, in which some of the Americans were slain, the ship was captured, and on all board taken

out, and then she was set on fire and burnt. "It was considered by us that this act was justified, because the vessel was engaged in warfare against us; but the Americans raised a great outcry on account of the violation of their territory, which was with difficulty allayed, and only when it was understood that the men had not been injured or even captured, and that the vessel was actually engaged in the warfare which was going on. The President of the United States issued a proclamation in which he was careful to point out that the sympathisers would render themselves amenable to capture and punishment under the laws of the United States.

"Whereas, in consequence of civil war in Canada, arms and ammunition have been obtained by the insurgents in the United States; and a force consisting in part, at least, of citizens of the United States have been actually congregated at Mary Island, and are still in arms, the President hereby warns such persons as shall compromise the neutrality of this Government by interfering unlawfully with the affairs of the British provinces, that they will render themselves liable to arrest and punishment under the law of the United States" (Message of President Van Buren, January 5, 1838.—Ann. Reg., 1838, p. 318.

"That is, that Americans were only liable to punishment by American law, unless they committed acts of hostility or warfare on British soil. Then, indeed, they would be liable to British force and British law, and accordingly, when some of them actually invaded the British territory, and were taken prisoners, they were not entitled to the privilege of prisoners of war, but were held liable to be tried and executed summarily by martial law. And in order to assert the right, and thus to excite terror among the assailants of the British territory, one or two out of some hundreds were thus tried and executed (Alison's Continuation of History, vol. vi., p. 94.) But that was by the right of war against armed enemies on British territory, and enemies liable to the terrors of war, though not entitled to its privileges. The exercise of this right was unquestioned. But it was quite different as to the affair of the *Caroline*.

So deep seated was the feeling of resentment created in the minds of the American people by our conduct in that matter, that years afterwards it was very near causing them to break out into war. In 1843 one McLeod, a British subject, was seized in New York on a charge of having been implicated in the affair of the *Caroline*, and as having slain one of the men who fell in the conflict on that occasion. The magistrate was about to discharge him, on the ground that the offence, if offence it was, had been committed on British territory, when the people prevented his liberation, and this led to the appointment of a Committee of Congress, which reported in a spirit so hostile that it amounted almost to a recommendation to a declaration of war. However, the prisoner was able to bring such overwhelming evidence of an *alibi* that on that ground he was acquitted. (Alison's Continuation, vol. vi., p. 316.)

The question came under discussion with reference to the right of search claimed by our Government as against American vessels. This, however, was quite a different right from that of searching neutral vessels during war, to ascertain whether they were conveying contraband of war, and was grounded not on any right to search the American vessels as neutrals, but only the right to examine whether or not they were British vessels, engaged in an illegal traffic. That as it was merely a claim to see whether vessels were American or British, and if they were American, even though they were engaged in the obnoxious traffic, it was admitted as clear that we had no right even to detain, still less to capture. This, it is obvious, was a distinct admission of the principle that, in time of peace, there is no right to capture vessels of another nationality, and only an exceptional right was claimed, to search, in order to discover what was the nationality. This was explained in the clearest manner in a dispatch of Lord Aberdeen :—

“It has been the invariable practice of the British navy, and, as he believes, of all the navies in the world, to ascertain by search the real nationality of merchant vessels met with on the high seas. In certain latitudes, and for a

particular object, the vessels referred to are visited not as American, but rather as British vessels, engaged in an unlawful traffic, and carrying the flag of the United States for a criminal purpose; or as belonging to States which have by treaty ceded the right of search to Great Britain, and which right it is attempted to defeat by fraudulently bearing the flag of the Union; or finally as piratical outlaws, professing no claim to flag or nationality whatever. Should the vessel prove American, no British officer could interfere further." (1010 Aberdeen to Mr. Stevenson, Sept. 14, 1841, Ann. Reg. 1842 pp. 310, 311.)

And the doctrine was zealously asserted by the President of the United States in these emphatic terms:—

"To seize and detain a ship upon suspicion of piracy, with probable cause and in good faith, affords no just ground for complaint on the part of the nation whose flag she bears, nor claim of indemnity on the part of the owner. The universal law sanctions, and the common good requires, the existence of such a rule. The right, under such circumstances, to capture and detain and search a ship is a perfect right, and involves no responsibility or liability. But with this single exception no nation has a right, in time of peace, to detain the ships of another upon the high seas on any pretext whatever, beyond the limits of the territorial jurisdiction. And such, I am happy to find, is substantially the doctrine of Great Britain herself in her most recent official declaration."—President's Message to Congress, Feb. 27th, 1842, Ann. Reg., 1843, p. 318.

An examination of the great work of Wheaton, or any other authority on international law, will lead clearly to these conclusions. There must be, to justify seizure on the ground of piracy, proof of depredation on the high seas; to justify it on the ground of right of war, a recognition of belligerency would have been necessary, and that would have entitled the crew to the treatment of prisoners of war. Piracy is the offence of depredations on the high seas, without the authority from a sovereign state, and pirates are the common enemies of all mankind. Whence it is that, as all nations have an equal interest in their capture and punishment, the vessels of any nation may capture them, but then only to bring them within the jurisdiction of regular tribunals for trial for piracy. And this international right

is strictly confined to piracy as an offence against the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. So that it is only those who are acting in defiance of all law, and are committing general depredations who can even be thus captured by the subjects of any nation for trial before their own tribunals. It is true that all persons, foreigners or subjects, who take a part in any civil war or armed rebellion, may be seized when actually engaged in it, tried by court martial, and executed. But that is quite a different kind of right—the right of war, and it is on the seat of war, and as against those actually engaged in it, on the territory of the State, executing them. It is quite otherwise of the seizure of persons on the high seas, in a vessel bearing the flag of a sovereign State.

It is an undoubted principle that in time of peace, the flag, of a ship is the sign of its nationality; not merely *prima facie*, but absolutely, for all foreign ships. The cruisers of the nation to which the flag belong, have exclusive jurisdiction over it. The only exception is the case of piracy, but piracy involves the intention of making depredation on the high seas, and against the vessels of all nations generally. Even when there is not that intention, it must be regularly proved in a Court of Law, on a trial for piracy, and there is no right of summary execution, even when there is a right of capture. But there is no right of capture unless there is either piracy or war.

Even at sea, no nation whatever in peace or war, has a right to execute its municipal laws on board ships of another country. It is only during a war that a limited right exists, of seizing soldiers of the enemy on board neutral vessels. But then as the seizure is made in right of war, the persons seized are entitled to the privileges of prisoners of war. Here, however, there was no war, for there was no recognition of belligerency. The state of civil war at the utmost, only existed on the land, and the insurgents were not recognized as belligerents. Even if there was a right of capture,

it could only be capture for the purpose of regular trial. But there was no right of capture, either on the ground of piracy or war, for there was neither piracy nor war. It was a state of peace, and there was not in the captured crew any intention of depredation on the high seas at all; still less general depredation. There was only a surmise or suspicion of intended complicity in rebellion, which is only an offence against municipal law. There was no such intention as constitutes the crime of piracy by international law, and certainly there was no state of war. So far from its being true, that Wheaton maintains the right of a belligerent to search or capture the vessels bearing a neutral flag, he expressly denies it even if a belligerent, and declares that on the high sea, every merchant vessel is rightly considered as part of the territory to which it belongs, and that therefore, even in time of war, a belligerent cannot even search it for deserters from its own military or naval service, and, of course, not for rebels or intended assistants of rebels. Hence it is, that the American Government attach so much importance to the register of the *Virginus* as conclusive, if *bona fide*.

"The judicial power of every State," says Wheaton, "extends to the punishment of all offences against the municipal laws of the state by whomsoever committed, within the territory; to the punishment of all such offences by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports; to the punishment of all such offences by its subjects, wheresoever committed; and lastly, to the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed." But this is only the right of punishment, on legal trial by regular tribunals, and the right of capture on board neutral vessels only exists in time of war; and in case of other vessels only exists in cases of piracy. No extension of the crime of piracy by the municipal law of a country can extend its right of capture on the high seas. A government can declare this or that Act on the high seas, as, for instance, complicity in rebellion, to be

piracy, and may punish its own subjects for it in its own Courts; but this, if it goes beyond the definition of piracy by the law of nations, will not even give the tribunals of the state jurisdiction over foreigners, much less a right to capture them on the high seas. And it has always been held, by the courts of the United States and of England, that piracy consists in a general intention of committing depredations on the high seas on the ships and subjects of all nations.

Even, however, if in such a case there was a right of capture, it would only be a right of capture for the purpose of regular trial, and as this clearly was *not* so, the capture was illegal; even assuming that a *right* of capture existed, for that right which existed was not really *exercised* by the captors; and they captured, it is clear, for the purpose of murder. But that they had no right to capture on the high seas merely on the ground of an intention to join in the rebellion is clear. For assuming that intention, what would it come to? Merely to an intention to violate municipal law, what then? That does not warrant capture on the high seas; and even if it does, still less does it warrant summary execution, without trial and legal proof of the intention, and legal disproof of the neutrality of the vessel, and the honesty of the register. The men were executed, not as pirates, but as rebels, by court martial; they were captured for one crime and executed for another—they were captured as pirates and executed as rebels.

These principles will be found fully borne out by Lord Brougham's essay on the "Right of Search," published in 1860, in which he upholds the right only in time of war, unless where it is allowed by treaty. And the reason for confining it to time of war is obvious enough; for war is, from its nature, a state of pressure and of danger to the countries engaged in war, which is allowed by neutral nations to justify or excuse an exercise of stronger powers than are allowed in time of peace. But the state of rebellion not recognized as a state of war, does not allow of the exercise of those powers against other nations.

In 1861, during the civil war in America, a debate arose in the House of Lords as to the effect of the recognition by the United States of belligerency, and especially with reference to piracy. The debate, however, had reference to the depredations of the *Alabama* on the commerce of the United States at sea. And any expression of the Peers as to piracy must be understood as referring to piracy at sea. It was undoubtedly said by one peer that supposing there had been no recognition of belligerency, the depredations of such vessels as the *Alabama* would amount to piracy; but this must have surely meant piracy by municipal law, and piracy by the laws of the United States—not piracy by international law—the essence of which is the intention to commit general depredations on the commerce of all nations; whereas, it is known that the *Alabama* preyed only on American commerce. To suppose that the peers were not aware of this distinction would be to impute the grossest ignorance; and any expression which might appear to ignore the distinction must be ascribed to the looseness of expression incident to a debate or discussion which has reference to a specific subject, and in which much is always supposed to be understood with reference to that subject. To the same cause must likewise be ascribed Lord Brougham's allusion to the execution, as pirates, of foreigners taken in arms on land, actually participating in the domestic disturbances of another country; for that is not piracy (unless the real object is private plunder), and though, by municipal law, it may be treated as such, municipal law can only be enforced on the territory subject to it; and not as against the subjects of other countries on the high seas. This debate, moreover, had reference to the *Alabama* and similar vessels bearing the flag of the Confederate States and of the alleged insurgents, not the flag of the United States. And the general doctrine that a recognition of belligerency is necessary to create a state of war, as against insurgents, with reference to the right of capture on the high seas, was abundantly recognized, and it was also recognized that, unless in a state of war, nothing

except piracy authorizes capture of vessels bearing the flag of another nation, not belligerent. And piracy, in a national sense, clearly means general depredation on the high seas.

The distinction between piracy by municipal law, and by international law, was fully recognized a few years ago, in a case in the Court of Queen's Bench, upon one of the Extradition Treaties with foreign states, which expressly included piracy. This the court held could not mean piracy by international law, because as to such piracy the courts of any nation had jurisdiction over culprits, whatever their nationality, so that extradition would not be necessary for the purpose of justice. (In *re Ternan* 33, L.J., Q.B. 201) In that case, it was distinctly recognized that piracy in the sense of international law means general depredation on the high seas; and it is only in this kind of piracy that the courts of all nations have jurisdiction irrespective of nationality. It is on the same principle that the vessels of all nations have power to search and seize vessels on the high seas, whatever their assumed nationality. It follows, therefore, that by our courts, as well as by those of the United States, it is clearly recognized that it is only in a case of piracy of that kind, that the cruisers of one State can search and capture the vessels bearing the flag of another.

In some able articles on the subject in the *Times*, it was very truly said, "we cannot keep the two questions of the capture of the *Virginus*, and the subsequent treatment of her crew apart." No doubt, this is sound, and our contemporary, we are happy to see, quite concurs with us in our view of the execution. "No language," says the *Times*, "can be too severe in condemnation of the execution, and we must claim the surrender of the survivors." We regret, indeed, that our contemporary does not agree with us as to the illegality of the capture, though, of course, that is a matter of comparatively minor importance.

The *Times* is a political rather than a legal journal, and naturally attaches paramount importance to political considerations, of which, perhaps, the influence may be detected

in the articles. But considerations of political expediency are unsafe and fluctuating grounds for judgment, and it is better to rest on the authorities of international law. We have shown that by Wheaton these authorities leave no doubt that the capture was illegal, and that even if it could have been legal with a view to regular condemnation in a Prize Court, it was rendered illegal *ab initio* by the obvious intention to make the capture with a view to the slaughter. The right of capture, therefore, even if it existed, was not really exercised and was destroyed by the illegal intention. But in truth the authorities are clear that there was no right of capture, as it was not a time of war. If the reason of this is asked, it is enough to appeal to authorities, but the reason is obvious on reflection. The state of war excuses the exercise of rights of capture on the vessels of neutrals on account of the formidable character of the state of war, and the excuse cannot be raised by a state which denies the existence of a state of war, and assert that there is only a mere internal rebellion.

Our contemporary, the *Law Journal*, differs from us so far that, like the *Times*, it allows the legality of the capture; but then it does so avowedly, on the ground of an assumed state of belligerency, and totally omits to notice that the Spanish Government denied its existence. The analogy, therefore, drawn from the American Civil war, entirely fails, for there we insisted that the United States Government had recognized the state of belligerency.

Even, however, supposing the right of capture lawfully exercised, there would still remain the necessity for a lawful condemnation of the vessel in a prize court; and what is far more important, a lawful trial of the prisoners captured in her, and charged with piracy. Nor would the affirmation of the legality of the capture, in the least dispense with the necessity for a lawful trial of the prisoners, for they in a state of belligerency, would be prisoners of war: and in a state of peace, would be prisoners entitled like all other foreigners to a fair trial in a regular court of justice. It is in this way,

that piracy has always been tried in the courts of all civilized nations, and no one ever heard of prisoners charged with that offence, unless indeed in actual conflict on the sea, summarily executed. In the case of a vessel captured at sea without any conflict or any act of piracy, the question of piracy would have to be legally tried and determined. There would only be a charge of piracy; legal proof of the crime would be necessary in a regular court of justice, and the legality of the capture would no more legalize summary trial and execution of the prisoners, than the capture of a man by a police-officer would justify his instant execution.

It may seem almost absurd to notice such a point, but it is a fact, however incredible it may appear, that persons have actually rushed to the conclusion that if the capture was lawful, the prisoners might be summarily put to death. A most monstrous and outrageous conclusion. Even a vessel is not legally condemned without a lawful trial in a regular court. All that a lawful capture can legally lead to either as to ships or men, is a lawful trial, and a lawful trial must still take place in some regular and lawful court. It is scarcely necessary to say, that a court-martial in such cases is not a lawful court at all; since it can only take cognizance of acts on the territory, and of those who have been taken in actual hostility. Nothing done on the high seas can make a case for a court-martial any more than anything on land, except a participation in actual insurrection. Robbery is not triable by court-martial, even in the case of subjects of the country; *à fortiori* in the case of foreigners, and piracy, is as the courts have declared, merely the offence of robbery at sea. A trial by court martial, therefore, in such a case, would be no trial at all. Upon this point of the case, we are glad to find a powerful supporter in our learned contemporary, the *Law Journal*, who cites the high authority of Phillimore.

"Were it not that extraordinary confusion of thought surrounds points in the law of nations, we should not deem it necessary to advert to the strange theory that the *Virginus* was a sort of pirate ship, and the people in her *quasi*-pirates. Those who wish to understand what a pirate is, and what

piracy is, should read chapter 20 of the first volume of Sir R. Phillimore's 'Treatise on International Law.' Without labouring the subject, we may point out that piracy is a crime committed *at sea*; pirates are sea malefactors, as the Greeks well said, *οι κατα θαλασσαν κακοιργοι*. Now the persons on board the *Virginus* contemplated mischief on land, but certainly they never intended to injure either men or property at sea. As Lord Stowell said to the grand jury, in 1802, 'You have to inquire of such acts committed *wherever the ocean rolls*.' That great judge would indeed have been amazed at the suggestion that an unharmed ship, bound for a port in the hands of belligerents or rebels, with soldiers and rifles, intending not to fight at sea, but to run away from all other ships, and to land cargo and men as soon as possible, could be condemned either in an Admiralty Court, or even *in foro conscientiae*, as a pirate ship. It has indeed been contended that upon the authority of the case of the 'Magellan Pirates' the persons on board the *Virginus* might be pronounced to be pirates. But the language of Dr. Lushington in that case clearly demonstrates the contrary. That very learned judge said: 'As to the general character of these transactions, I really entertain no doubt that they were piratical acts, in no degree connected either with insurrection or rebellion. In one sense they were acts of wanton cruelty in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of opinion that the persons who did these acts were guilty of piracy, and were to be deemed pirates, unless some of the other objections which have been urged ought to prevail. It has been said that these acts were not committed on the high seas, and therefore this murder and robbery is not properly or legally piratical. But in this case the ships were carried away and navigated by the very same persons who originally seized them. I consider the possession at sea to have been a piratical possession, and the carrying away the ships on the high seas to have been piratical acts.'
 'I apprehend that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas.'—Phillimore's *International Law*, vol. i. chap. xx. p. 423."

We are happy to observe in the most able organs of public or professional opinion, a general concurrence in our views. As the *Saturday Review* stated, with truth, the *Virginus* sailed from the port at Kingston with a regular clearance from the Custom House officers; so that it was perfectly well known that the ship conveyed stores and arms to the rebels

in Cuba, but the vessel was not in the service of the insurgents, and carried the American flag.

The President of the United States stated the facts of the case in his message. Upon those facts there can be no doubt that the law advisers of the President was right; that the capture was unlawful, and that even if it was lawful, the executions were utterly unjustifiable. We learn from the *Albany Law Journal* that Dr. Woolsey, in a lecture on International Law as Yale Law Class, adverted to the case, and considered it not provided for by the law of nations. He said that the offence was not piracy, for there was no *animus furandi*, nor carrying contraband of war, as there was no war. The conclusion, according to Wheaton, is that there was no right even of capture. The Professor put it as a right of self-defence, but this is clearly an error, for the seizure was on the high seas, and self-defence would apply only in Cuban waters. The Professor says that a strong nation would in such a case seize the vessel and take the consequences; but this waives the whole question about it, what would be the consequence? And if it is contrary to the international law, and the other nation were also a strong nation, the result would be war. The whole object of international law is to lay down rules right which may prevent war. And there are no rules of international law clearer or stronger than this—that in time of peace the flag covers the vessel, unless it is engaged in piracy or depredation on the high seas. It is obvious that the Professor spoke hastily and without due consideration. The case clearly violates clear and elementary principles of international law.

The view we take of the question is, we observe, confirmed by a letter of Professor Lawrence, in the *Albany Law Journal*. The Professor, we are glad to find, says—

“I intend to treat the subject in its extended range, in one of the lectures which I propose to deliver, at some period of the winter, before the Columbian University at Washington, in acknowledgment of the honor conferred on me by the corporation in electing me the first ‘Professor of the Law of Nations’ in the school of law of that university.” Alluding

to Professor Woolsey's letter, he says, "A notice, which appears in your last number, of what purports to have emanated from a high authority, is, however, so much at variance, not merely with my present views, but with the conclusions arrived at several years since, and which accord, as far as my knowledge goes, with the opinions of all eminent publicists, as well of England as of the continent of Europe, that I cannot avoid sending you a paragraph having reference to a Sardinian vessel captured by the Neapolitan marine, during the existence of a revolutionary movement in the States of the king of the two Sicilies. 'That no apprehended inconvenience, on account of the revenue or even public safety, can, in time of peace, give a right of visitation on the high seas, although near the coasts of a country, if beyond the ordinary maritime jurisdiction, but that such power can only be exercised by the positive or tacit permission of the State to whose subjects the merchantman belongs, is well shown by an eminent civilian of Doctors' Commons in an opinion which he has recently furnished for the guidance of a foreign government' (Lawrence on 'Visitation and Search, 73). This article was transferred to the second edition of Lawrence's Wheaton, 229. It is there stated that the opinion referred to was given by Dr. Twiss, in 1858, the time of the occurrence. One to the same effect was also prepared by Sir Robert Phillimore, at the request of Count Cavour."

LEGAL TOPICS.

THE TICHBORNE CASE.—There appears a prospect of the termination of this case. In adjourning for the Christmas holidays, the court intimated that they should expect that Mr. Kenealey, who had been speaking for ten days, and had spoken 21 days in his opening speech, would close his address in a week after the court renewed its sittings. The judges intimated that only a small portion of the present speech approached to a summing up of the evidence, which is all that Denman's Act allows, and the Lord Chief Justice said that a great part of the speech had merely gone over the same ground as before. This was putting it far too mode-

ately. Out of the ten days during which Mr. Kenealy had been speaking, it is a simple fact that he had only occupied two hours in summing up evidence. He took that time to sum up the evidence on both sides on one of the most important parts of the case—the arrival of the *Osprey* at Melbourne in 1854. There were about 20 witnesses on that head, and their evidence only occupied two hours. From this it may be seen that it would only take about three or four days to sum up the evidence of his 250 witnesses, even supposing there were as many whose evidence was worth summing up. Nearly the whole of the ten days was occupied in vague declamation, and chiefly in attacks upon the prosecution, with irrelevant digressions about Byron, and Bamfylde, Moore, Carew, Savage, Long Pole Wellesley, and other eccentric characters, with cases in support of a theory that big men were generally bad men, and other topics of that sort. It was time this was checked, and the court, not too soon, resolved to check it. There is a precedent for a court stopping a party who is merely wasting time in the case, and it is a precedent set by the highest tribunal in the realm. In the case of the Sheddens, before the Lords some years ago, after they had spoken 21 days, as they were merely repeating what they had said before, and plainly wasting time, the Lords refused to hear them any longer, and proceeded to judgment. The bar had long wondered at the forbearance of the court, in the present case.

Another great power has already been established by the court, and that is the power of adjourning in criminal cases, when, by fault on the part of the defence, the prosecution has been precluded from bringing up witnesses in time. On the 8th of August Mr. Kenealy, in his opening speech, stated the evidence of two men—Brown and Luie—whose statements had been taken a month before, and one of whom was to swear that the other was mate of the *Osprey*, and the other that the *Osprey* picked up “Roger” after the wreck of the *Bella*. Being asked by the court what port the *Osprey* came from, he said New Bedford, though the

witness stated it was New York. The prosecution at once sent out and brought the captain of the New Bedford *Osprey* to prove that he picked up no one. Luie was not called until two months later in October, near the close of the case for this defence, and then he swore that the ship came from New York. Thus the prosecution had been, by a trick, prevented from bringing the right witness, and the court, upon that ground, granted the prosecution time to make enquiries in America, which resulted in contradictory evidence being obtained, and ultimately the evidence of Luie was found to be false. Had it not been for the adjournment, this would not have been discovered, and the fraud might have succeeded. But the adjournment certainly would have vitiated the trial, on a writ of error, had it not been for the trick played the prosecution. For, beyond a doubt, there is no power to adjourn a criminal trial in order to enable the prosecution to obtain further evidence, unless the necessity for it is caused by some act of the prisoner, or others in collusion with him. In ancient times the object was attained by discharging the jury, a course which was held legal if the prisoner, or others in collusion with him, had kept away witnesses, but Lord Hale said that in other cases it was wrong, and Foster was of the same opinion. In the time of Lord Kenyon, it was laid down by all the judges that an adjournment—adverse to the prisoner, and not on account of any fault of his—can only be justified on the ground of “actual physical necessity (*Stone’s case*, 6 Term Reports), and a special entry on the record was directed to be made, to prevent a Court of Error. In *Winsor’s case*, however, which arose in 1866, and went to a Court of Error, it was held that any urgent need would justify the discharge of a jury, and it was fully recognized that the act of the prisoner might justify it as if he or his friends obstructed the trial. That which would justify the stronger measure of discharging the jury, would, of course, justify the mere adjournment. And fraud, as in this case, would be as strong a justification as force.

It is not likely that the case will arise again, and as the court expressly said, if the course taken was unprecedented, so, in this respect, was the case itself.

LIBELS IN CRITICISMS.—The *Law Times* says that "The case of *Gilbert v. Enoch*, recently tried before Mr. Justice Brett, seemed to have attracted a somewhat undue amount of attention, as if some novel principle had been established, or the old principles applied in some new manner. The alleged libel was contained in a criticism on a comedy, the criticism amounting to this: That the play was coarse, vulgar, and indecent." What did Mr. Justice Brett tell the jury? First, that however hostile in spirit and wrong as a criticism—rather a loose expression, we think—if it does not travel away from the work to slander the author, it is no libel. If the criticism goes beyond the work, and attributes to the composer some conduct or motive which, if truly imputed, would in the eyes of reasonable persons of right sentiment, cause a feeling of hatred, ridicule, and contempt for him, it is a libel. *Bona fides* and honest belief in its truth are then immaterial. What is there in this which was not already established law? We do not, however, wish to detract from the admirable clearness and conciseness of Mr. Justice Brett's direction, which gives us the law applicable to the case under consideration in terms not to be misunderstood."

But our contemporary has missed the point, which is whether there may not be a libel on an author in a criticism, even though confined to his work, and to his character as an author. This point was waived in the authorities cited, which are, therefore, now obsolete. The authorities on the point are to be found in cases quite recent, in which the criticism has been confined to the work, but has been complained of as unfair and malicious, and as affixing an unjust stigma to the plaintiff's character as an author. Such was the case of *Dixon v. Enoch*, and such was the case of *Gilbert v. Enoch*. And the merit of Mr. Justice Brett's summing up was in a clear expression of the legal principle applicable to that question, an unfair and malicious attack upon a work.

THE INNS OF COURT AND LEGAL EDUCATION.—Attention has been awakened, in more ways than one, to the subject of legal education. There are two rival plans or principles;

one, that of Lord Cairns, carried some years ago at Lincoln's Inn, for developing the Collegiate system in the Inns of Court with a view to founding thereon a legal university; the other, that of Lord Selborne, for founding a School of Law on the ruins of the Inns of Court. Those who are impressed with the truth of Dr. Arnold's idea that nothing great can be done except by building upon ancient foundations, will feel rather in favour of Lord Cairn's plan. Either plan however, will necessarily involve considerable interference with the Inns of Court. For the proceedings either of the Inns, or of the Legal Council of Education, have certainly failed to satisfy the public or the profession on the subject. The Legal Education Association therefore sent a deputation to the Lord Chancellor, formerly President of the Association, and he avowed his unabated interest in their object, and though he could not at present promise to take active measures to promote it, he promised to circulate a Bill drawn with a view at some future period, to carry it out.

ACTION FOR SEDUCTION.—The *Law Times*, commenting on one of these cases observed :—

“ The case illustrates in a very forcible manner the anomalous condition of the English law on the subject of seduction. In that case there had been a previous trial for breach of promise of marriage brought by the daughter of the plaintiff, but as there was not sufficient evidence of a promise by the defendant the action failed. On this the father, in accordance with suggestions made at the former trial, brought an action for seduction against the defendant. Thus owing to the rule of law that no action lies against the seducer at the suit of the party immediately interested, but that the only right of action is founded on the loss of the girl's services to her father, reducing the question to a case of master and servant, all the parties in this case were put to the trouble and cost of two trials, when the whole matter might have been very well settled on the first occasion, but for the rule in question. If the woman who was seduced, and to whose father the jury awarded damages in the second action, could have brought an action for seduction in her own right, the two causes might have been joined, and all further trouble have been avoided. On what grounds such an anomaly is perpetuated it would be difficult to say, except that it has become

venerable by-age. It has been commented on over and over again, and nothing but the aversion of the Profession from all changes in what they have become accustomed to could have kept such a rule in force. The rule amounts to this, that the party really injured has suffered no injury sufficient for the law to notice, but that her father, or master, who has lost her services, can bring an action for such secondary and inferior loss. This loss of service may be of the most trifling description. In one case, indeed, tried by Chief Justice Abbott, his Lordship held that the loss by a father of his daughter's services in making tea was a sufficient loss to enable him to maintain this action. But when the loss of service has once been established, then damages are heaped up on other grounds, and this practice had become so inveterate in Lord Ellenborough's time, that he said it could not be shaken. So that the damages given frequently include an appraisalment by the jury of the moral delinquency of the defendant, and the injury and dishonour sustained by the real plaintiff and her family. Is it not time that a rule of law, which places a father's inconvenience in having to make his own tea above the loss of his daughter's virtue, and the dishonour they both suffer, should be abrogated, and the seduction itself be made the ground of action, if any such actions are to be allowed? There are some who think, however, that such actions should not be maintainable, the consent of the woman taking away the right of action. Whichever opinion prevails, it is very desirable that the law should be placed on a reasonable footing, and that juries should not import into their verdicts damages for injuries quite distinct from the ostensible one on which the verdict is founded."

The law could not be altered as regards rights of action. How could a woman be allowed to sue for an act done with her own consent and without a promise of marriage? And, on the other hand, how would the law deprive a person—parent or employer—of a right of action for loss of service? The evil complained of is in the administration of the law; in judges admitting nominal evidence, or allowing juries to give moral damages. To do either of these things is simply to *abuse the law*. If it is considered proper to render seduction a penal offence—punishable by fine—let it be done directly, it ought not to be done indirectly under colour of a civil action, that is the real mischief.

COMMISSION OF INQUIRY INTO THE COURTS OF LAW.—
The appointment of a Royal Commission to inquire into the

Administrative Departments of the Courts of Justice has recently taken place. The Commissioners—Lord Lisgar, Baron Bramwell, Mr. William Law, of the Treasury; Mr. Trevelyan, M.P.; Mr. Alderman West, and Mr. Rowsell—have been chosen to represent the Parliamentary, the legal, and the official interests concerned. The issue of the Commission, says the *Times*, is the result of inquiries conducted by a Select Committee of the House of Commons on the public expenditure for Civil Services, which has been ably presided over by Mr. Childers. The outlay of the country upon legal establishments is, like the rest of the Civil Service expenditure, nominally subject, with some unimportant exceptions, to the control of the Treasury. But the amount of actual control exercised varies greatly, according to the differences in the power possessed by the judicial officers in different Courts to determine the number and emoluments of the persons employed under them, and according to the statutory authority reserved, under a number of Acts of Parliament, to the Treasury. It is believed that large amounts of public money have been wasted on pensions and compensations which might have been spared by the adoption of economical arrangements in the abolition of offices, by sound rules of superannuation, and by a just distribution of labour. It is believed that, in spite of the reforms which have been effected in recent times, there are still many unnecessary places in existence, that some officials are overpaid, and that others give a very imperfect return in the shape of work done for the salaries they receive. It has been urged on the part of the treasury that if that department had possessed the same powers of control over the expenditure on judicial establishments which it has been permitted to exercise over other departments of the Civil Service, the alleged instances of extravagance which we have mentioned would have been effectually corrected. At any rate, Mr. Childers's Committee, although its inquiries have not yet terminated, has satisfied itself that a *prima facie* case against the existing outlay upon the Courts of Law has been established, and it recommended, in a special and separate report, the immediate appointment of the Royal Commission which has now been sitting. The Commissioners are empowered to inquire generally into the numbers, salaries, superannuations, and cost, and the administration, regulation, organization, and manner of appointment and of promotion for each judicial establishment. They are charged further to ascertain where the responsibility for the organization for each establishment should rest, and what should be the relation of the persons so responsible to the Treasury. Mr. Childers's Committee,

although it took a large mass of evidence both in support of the demands of the Treasury and in defence of the existing system, did not venture to undertake the final determination of the controversy. It is plain, however, that the Committee in the main held with the Treasury that our judicial establishments are highly expensive and badly organized, that the absence of a uniform principle in their regulation is mischievous, and that a vast amount of public money is paid away in the form of compensation on the abolition of offices to persons whose services might be usefully employed in some public work. The passing of the Judicature Act has made it more necessary than ever to lay down general rules as to salary, compensation, superannuation, and so forth, to be afterwards embodied in a general Statute, which would obviate the necessity for special legislation out of which the present confusion has arisen. The question of compensations and of the employment in new offices of persons receiving pensions in compensation for the abolition of old offices is one of the most important of those into which the Committee have to inquire. The change which has occurred in our legal organization in recent years has swept away large classes of offices, to the holders of which very large compensation has been given; and, as a considerable proportion of the officials claiming compensation on this ground must be persons in the prime of life, the charge remains for a long time a dead weight upon the taxpayers. Thus the constitution of the Probate Court created claims for compensation amounting at the outset to £120,000 per annum, and reduced by deaths in the course of fifteen years to the extent of no more than one-third. There can be no doubt that many of the officers of the old Ecclesiastical Courts would have been perfectly well able to give continuous service under the reconstructed system if that had been insisted upon in considering the arrangements for abolition and compensation. It is not fair to the general body of taxpayers that the public money should be paid away to men in the full vigour of their powers on the mere ground of some departmental change, and that no work should be done in return. It can but be morally injurious to the men themselves, as well as a shameful waste of intellectual force, that they should be relegated to rust half their lifetime on a pension which they have not earned by service, and for which they give nothing in return."

There can be no doubt of the truth of all this; the illustrations of it are so frequent and flagrant as to suggest the suspicion that changes in the judicial system have often been made for mere purposes of jobbery, the holders of old offices being pensioned off to create patronage of new ones. Twelve

officers of the Marshalsea Court, abolished about twenty years ago, still receive nearly £1500 a year, and in the meantime the Westminster County Court has been created in its place with a new staff of officers, so that the country has been paying for *two* courts and having only one. So as to Bankruptcy this is the usual course pursued.

OPERATION OF THE ADULTERATION ACT.—The operation of the Adulteration Act has caused great satisfaction to customers, but great discontent among tradesmen. This is natural. All classes rejoiced when milkmen were fined, as they have been in many cases, for selling milk mixed with water; or farmers for mixing the milk with water before they sent it up to the milkmen; and everyone was pleased to find a farmer fined £10 for sending up watered milk, or a milkman fined £5 for selling milk, one-fourth of which was water. So all, except the bakers, were delighted to find bakers fined for putting alum into their bread; and not even the grocer could complain when grocers were fined for selling chicory as coffee. But when the grocers were fined for selling tea mixed with sand, or iron filings, they cried out, because they said they did not make the tea, and only bought it. The merchants or importers might make the same defence, and the milkmen made it, when they said they had the milk from the farmers, but they made it in vain, and it was a vain defence to make. It was made in vain the other day, in an action by a grocer against a tea merchant, for selling him adulterated tea. (*Powell v. Newson*) Court of Common Pleas, Guildhall, Dec. 14, reported in the *Times*, Dec. 15. There the grocer had bought good tea, and paid a fair price for it, and the court held him not bound to take bad tea. This disposes of the false plea set up by the grocer; and the learned judge, an excellent judge for such a case, Mr. Justice Grove, observed that "the Adulteration Act had conferred a great benefit on the public." That is our opinion, and we are strongly in favour of its being generally enforced. Indeed justice requires that it should be enforced generally, if at all, and then its operation will be beneficial to the fair

trader as well as to the public. The chemists were alarmed by the conviction of one of their body for selling, as "citrate of magnesia," some mixture which contained no magnesia; but why could they not sell the article by its real name? They rejoiced exceedingly when a magistrate declined to convict in the case of spirits of nitre, as it raised a chemical question as to what it meant; but this only shows that they had no reason to complain of the operation of the Act.

THE REVISED STATUTES.—The commencement of the legal year appears to be a favourable opportunity for calling attention to the great delay in the publication (by authority) of the revised edition of the Statutes, a work the completion of which is a necessary preliminary to the greater work of codifying the Statute Law. The publication of a revised edition of the Statutes was directed by a letter of Lord Chancellor Cairns, issued with the sanction of the Treasury, and dated the 9th of July, 1868. Since that date three volumes only of the Statutes had appeared, the last of which was published in the summer of 1872. It is said that the whole series will consist of not less than 18 volumes. The Editor has recently, in answer to a correspondent, announced that the 4th volume is now just on the point of publication, and that the printing of volume 5, which will probably bring down the work to the reign of George IV., has begun, and is likely to be completed early in 1874. He went on to say, "the chief cause of the slow progress hitherto made has been the great labour and time required for the preliminary work of expurgation; that is, the repealing of a vast mass of expired and obsolete legislation by the action of Parliament. The expedient of setting on additional hands to the work, in order to accelerate progress, was adopted last year, and the result may be seen in the bulky Statute Law Revision Acts passed in the Sessions of 1873 and 1874. So much has now been done in this direction that no further obstacles than such as may be incident to the publication of so heavy a work are now likely to prevent the continuous and regular production of the volumes, which, I believe, will rather fall short of than exceed the number of 18."

ABUSES IN THE SUMMONING OF JURIES.—There is no part of our judicial system on which we more pride ourselves than that of trial by jury, and there is none in which such gross abuses are so prevalent. The origin of them all

is this—that the sheriffs have long been accustomed to delegate this most important part of their functions to obscure and irresponsible persons. The under sheriffs being always, contrary to ancient statutes, practising attorneys, it is difficult to allow them to have anything to do with the jury lists, and, indeed, their doing so in any case in which they were concerned, would probably vitiate the jury panels. But the function of making up the jury lists and summoning juries is delegated to obscure persons, even bailiffs, who have no proper qualifications for the office, and no proper remuneration for the work, and also too often seek to make it a source of profit by irregular means. One mode, which has been long practised, is by taking money for not summoning jurors who desire to escape from service. Of course, the result of this is that others have to serve much more often than they otherwise would, and then they, feeling the hardship and injustice of such frequent service, constantly absent themselves. Thus the suitors continually find the number of jurors deficient, especially in cases of special juries.

The *Times* has the following paragraph :—

“ A report has been lately presented by Messrs. Allen and Son, the county solicitors, relating to the present mode of summoning juries at the Middlesex Sessions. The report stated that in July, 1873, a complaint was made by a jurymen, against the summoning officer of juries to this Court. The jurymen in question, who was summoned, found it very inconvenient to attend, and went to the office, when he saw a person in a back room, and on representing to him the difficulty of serving, this person suggested that as he was a gentleman two guineas might overcome the difficulty. The officer was summoned by Sir W. Bodkin to the Court, and he then stated that he knew nothing about the matter, and that one of his clerks must have seen the gentleman, and committed the offence which had been stated. Sir William Bodkin, however, was not satisfied with the explanation, and told him that the county solicitors would be instructed to inquire into the matter. He said that he received nothing for summoning the juries, although he had to pay a clerk 25s. for the performance of the duty; and at this statement Sir W. Bodkin expressed surprise that any duty should be accepted to be performed gratuitously, and supposed that they paid themselves by douceurs from the

public. In this case the juryman did not pay the two guineas, and brought the matter before the Court in the manner stated; but subsequently another gentleman, a stockbroker, made a similar complaint, and has since positively identified Strong as the person to whom he paid the £1. The opinion of Mr. Poland had been taken on the facts of this case, and he considered that an offence had been committed against the 6 Geo. IV. c. 50, s. 43, and that the parties who received the money might be proceeded against for a misdemeanour. Regard being paid to the number of jurors annually required for carrying on the business of the county of Middlesex, Sir William Bodkin desired that the matter should be submitted to the Court, and to consider the propriety of arranging with the sheriffs of Middlesex for the nomination and payment of an officer whose duty it should be to attend to the summoning of jurors to serve at the Middlesex Sessions, and to make such regulations as should prevent a continuance of the present corrupt practice. The report was referred to the committee of accounts and general purposes, and they were authorised to make some arrangement with the sheriffs of Middlesex, and to report to the Court on the next county day. At the same time Mr. Serjeant Cox said that, not very long since, a similar case had come before him, has he had no doubt that this system had been carried on to a great extent."

INTERNATIONAL CODIFICATION.—A Society, originating out of the International Conference held at Brussels, has been lately organised at Rome. Count Sclopis and General Garabaldi were chosen Honorary Presidents, M. Mancini, President, the President of the Senate and the Mayor of Rome, Vice-Presidents, and Professor Pierantoni, General Secretary. Upwards of a hundred of the leading men of Italy were present, and much enthusiasm prevailed. The event was inaugurated by a grand Parliamentary dinner, given in honour of the occasion. Arrangements are being made for the formation of branch societies in other countries, as provided by the Brussels Conference.

BOOK NOTICES.

LIFE OF LORD CHIEF JUSTICE DENMAN. By Sir Joseph Arnould. This is beyond all comparison the best and most valuable work of legal biography which has appeared in our time, if it is not the best that has ever appeared. The character and career of Lord Denman were eminently worthy of portraiture, and Sir Joseph Arnould has proved himself worthy of the work. He has succeeded in producing a biography, marked by cordial appreciation of a lofty, pure, and noble nature, and yet pervaded by a spirit of impartial candour, free from any tendency to indiscriminate eulogy. A great master in literature has well described the object and scope of a good biography: "The great object of biography," observes Coleridge, "is to fix the attention and to interest the feelings of men on those qualities and actions which have made a particular life worthy of being recorded." This object has been admirably carried out by Sir Joseph Arnould, who has succeeded in embodying in his work all that is really of interest in a biography, without even lapsing into prolixity. Every part of Lord Denman's long and honourable life is amply illustrated by every trait and feature of his noble character admirably displayed. And the work will be read with the deepest interest, especially by those who are so fortunate as to have personal remembrance of Lord Denman (as the writer of these lines happily has) and whose personal recollections will enable them at once to attest the truth of the portraiture, and to recal the incidents it records, and the traits of character it so admirably embodies. The illustrious jurist, Story, has observed upon the great interest and value of good biographies of eminent members of the profession, and certainly no one who reads this interesting work will fail to feel the force of the observation. It would be impossible to find a better illustration of it, whether as to the subject of a good biography, or the manner of its execution. No one could imagine a finer character than that of Lord Denman, nor a nobler career than his. It is impossible to rise from the perusal of the story of his life without finding his own nature elevated and improved, and without feeling the highest admiration and veneration for his character, and at the same time feeling grateful to the biographer who has presented us with so admirable a portraiture of it.

THE LAWYERS' COMPANION FOR 1874. Stevens and Sons.—This useful publication still continues and preserves its character

for utility. Twenty years ago, when it was little more than a diary, it was edited for some years by Mr. Finlason, who soon imparted to it a higher character, by importing into it a variety of elements, by degrees making it really a kind of *vade mecum* for the use of the profession. He added tables not only of costs, but of the times for taking all the different steps in a suit at Law or Equity; lists of Statutes corrected down to the last year; analyses of the practical Statutes of the last session; digests of the practical cases decided during the previous year, and a variety of other matters all highly useful and valuable to the profession. All these features which he introduced into the work are, we observe, still retained, together with the stamp duties, postal information, tables of interest, &c., and similar details. The number for the present year contains, of course, an analysis of the Judicature Act. All this information is prefixed to the diary, and then there is added a law list for town and country; and the whole is so managed that though a half-page is given to each day in the diary, and a half page every week for memoranda, the whole is contained in a moderate volume which can go in the pocket.

APPOINTMENTS.

Sir John Duke Coleridge, Lord Chief Justice of the Common Pleas, has been sworn a member of the Privy Council, and have subsequently been created a peer under the title of Baron Coleridge, of Ottery St. Mary's. The Lord Justice, Clerk of Scotland, has also been created a peer under the title of Lord Moncrieff, of Tulliebole.

The Vice-Chancellor, Mr. Charles Hall, the Attorney-General, Mr. Henry James, and the Solicitor-General, Mr. W. Vernon Harcourt, Mr. Archibald Paul Birt, Chief Justice of the Colony of Western Australia, and Mr. W. Henry Doyle, Chief Justice of the Brahma Islands, have received their honour of Knighthood. The Lord Chief Justice of the Common Pleas has appointed Mr. M. J. Mackenzie, of the Common Law Bar, his private Secretary under the Judicature Act. Mr. W. B. Grigsby, of Balliol College, Oxford, has been appointed Professor of International Law at Zeddo, Japan; Mr. Nelson Ward, one of the Registrars of the Court of Chancery; Mr. Thomas Shuttleworth, Solicitor, Judges Associate on the Northern Circuit; the duties of prothonotary being divided; Mr. Shuttleworth for Lancaster, Mr. Worthington for Manchester, and Mr. T. E. Paget for

Liverpool. Mr. William Smith, Solicitor, has been appointed Clerk to the West Riding Justices sitting in Sheffield; Mr. Henry Vickers, Solicitor, Clerk to the Borough Magistrates at Sheffield; Mr. William BurrIDGE, Jun., Solicitor, Clerk to the New Local Board of Health, of Wellington, Somerset; Mr. John Graham, Solicitor, Coroner for the Chester Ward, of the County of Durham; Mr. Samuel J. Tombs, Solicitor, Town Clerk of Droitwich; Mr. Peter Leckie to be a member of the Legislative Council of the Colony of British Honduras; Mr. John Bramston, Attorney-General for the Colony of Hong Kong; Mr. Francis Snowden, Senior Puisne Judge of the Supreme Court of the Straits Settlements, and Mr. George Phillippo, Junior Puisne Judge of the same Court.

OBITUARY.

October.

29th. Sharp, J. A., Esq., Solicitor, aged 51.

November.

- 17th. Fearon, John P., Esq., Solicitor, aged 70.
- 22nd. Bartley, Henry J., Esq., Solicitor, aged 47.
- 26th. Poynder, Thomas H. A., Esq., Barrister-at-Law, aged 60.
- 27th. Hughes, William, Esq., Solicitor, aged 72.
- 28th. Ayerton, Edward Nugent, Esq., Barrister-at-Law, aged 58.
- 30th. Pole, E. S. Chandos, Esq., Barrister-at-Law, aged 48.

December.

- 3rd. Rose, Sir George, F.R.S., Barrister-at-Law, aged 91.
- 3rd. Berkeley, R. J., Esq., Q.C., Barrister-at-Law, aged 68.
- 5th. Twopeny, William, Esq., Barrister-at-Law, aged 76.
- 7th. Walter, Edward, Esq., Barrister-at-Law, aged 70.
- 7th. Winterbotham, H. S. P., Esq., M.P., Barrister-at-Law, aged 37.
- 10th. Rollit, John, Esq., Solicitor.
- 12th. Cholmeley, Stephen, Esq., Solicitor.
- 12th. Southie, Horace R., Esq., Solicitor, aged 44.
- 13th. Stubbs, George B., Esq., Solicitor, aged 81.
- 13th. Ward, J. W., Esq., Solicitor, aged 63.
- 14th. Myres, Mr. Alderman, Solicitor, aged 65.
- 14th. Briggs, John Adolphus, Esq., Solicitor, aged 49.
- 19th. Woodthorpe, F., Esq., late Town Clerk of the City of London, aged 58.
- 20th. Edwards, Frederick, Esq., Solicitor, aged 45.
- 22nd. Pigot, Lord Chief Baron.
- 23rd. Anderton, H. Lyon, Esq., Barrister-at-Law.

THE LAW MAGAZINE AND REVIEW

N^o. II.—VOL. III.—FEBRUARY, 1874.

I.—THE HISTORY OF ENGLISH LAW.

THE great object of legal history is to show, as Guizot observes, the causes of legal events, and the origin of legal institutions. Without this knowledge, the reasons for their adoption or continuance may be entirely mistaken; and they may be supposed to have an application to modern times when, in truth, they are wholly inapplicable. It is of peculiar importance to distinguish those barbarous elements in the institutions of a nation which are fated to disappear from those founded on the eternal principles of reason, which are destined to endure; and to mark the decline and decay of the one, and the gradual advance of the other. This, as it is the great object of the history of law, so gives to it its greatest interest and attraction, blending, as it does, the philosophy of law with practical utility. For in this way we come to see what parts of the early institutions of a nation are suited, or unsuited to the present state of society,—the causes of their existence in former times, and the reasons why they should now be modified, in accordance with the dictates of advanced intelligence and experience; or why, on the other hand, being based upon the eternal principles of reason, or on the enduring necessities of a free and intelligent community, they are destined to remain.

This may be illustrated by reference to that which is now the prominent subject of interest—the judicial system—and especially as to the constitution of the judicature. It was a

cardinal principle with the Romans, in their best age of the republic, that no free citizen should be deprived of life, liberty, or property, without the judgment of a judge taken from the people, nor of life without the judgment of a popular tribunal. Hence, said Cicero, it was a law : *Nihil de capito civis, aut de bonis, sine iudicio populi, aut eorum qui, de quaque re constituti iudices, ut detrahi posse.*" This, which almost reads like a paraphrase of the celebrated clause in our Great Charter, expresses a principle necessarily regarded as vital in any free and intelligent community, and which has, therefore, been always adhered to in this country, and will be adhered to for ever. And more than that, as regards a popular tribunal in criminal cases and public prosecutions, it has been, in modern times, adopted in every country in Europe and will be adopted in every free and intelligent community that is ever formed, to the end of time. So the whole course of criminal trials—under the old Roman system, trials before sworn and impartial judges, *aqui et jurati iudices*, as Cicero called them, hearing the evidence of sworn witnesses, *audietis ex juratis*, as it was founded in reason and justice, gradually displaced the ruder usages, and will in substance continue for ever to endure, because the principles of justice and reason are eternal. But, again, while a popular tribunal will always be regarded in a free country as a necessary guarantee of liberty and personal security, it was equally a principle of the Roman system that in civil cases, not involving any such question, and only requiring accuracy of investigation, special judges should be selected for particular cases; and this rational principle, long ago adopted in foreign countries, has gradually, in modern times, been prevailing in our own, and was finally sanctioned by the legislature in the recent Judicature Act, enabling the court to commit cases to official referees.

Thus we see the eternal principles of reason and justice prevail and endure; and the great object of legal history is to trace their influence and progress. This it

is which gives such essential importance in the study of legal history, to the introduction, the influence, and the advance, of the Roman elements in the laws and institutions of a nation. For, as Lord Holt said, as the laws of all nations were raised out of the ruins of the civil law, and all governments are sprung out of the ruins of the Roman empire—all the principles of our law are borrowed from the civil law, and, therefore grounded on the same reason in many things. That is, he might have added, and no doubt meant, all those parts of our laws and institutions which are grounded upon reason at all. For, the laws and institutions of the Romans being, as Sir Henry Maine has observed, those of a free and intelligent people, with the longest and largest experience any civilized nation has ever been known to attain, the laws and institutions of any other free, intelligent people, with similar experience, would naturally, though gradually, approach to that great model. The progress of its influence was slower in this country than others; from various causes, chiefly its insular position, but for that very reason, it is more important to trace its progress in our legal history, especially as it includes all that is of real value in our law, and all that has proved permanent in it, and all that is still existent and is destined to exist. It may be traced in the first dawn of restored civilization, when, as Bede tells us, of the first Christian king, he conferred this benefit on his subjects of framing his laws after the example of the Romans—“*decreta illi judiciorum justa exemplum Romanorum, cum consilio sapientium, constituit.*” The channel through which the Roman system exercised an influence on the formation of our laws and institutions was, as Sir J. Mackintosh pointed out, the ecclesiastical. The influence was exercised earliest, first in the ecclesiastical courts: the first which decided upon evidence, and afterwards in courts of equity, where for ages, the ecclesiastics sat as chancellors. It is to be traced in the Saxon laws, and especially in that valuable collection of them known, made in the reign of Henry I, and hence, called

Leges Henrici Primi, in which Saxon usages are curiously blended with precepts and principles taken from the common law. It is to be traced again in the Treatise of Glanville, in the reign of Henry II., where it is stated that such challenges or exceptions were allowed against jurors, as the common law in the Ecclesiastical Courts allowed against witnesses: "*Excipi possunt juratores eisdem modis quibus et testes in cuna christianitatis juste repelluntur.*" It is to be traced again in the greater work of Bracton, in the reign of Henry III., where it is stated in the same way: *eisdem modis avoventur a sacramento quibus testes avoventur a testimonio.* It is to be traced again in that interesting and valuable monument of our ancient law, the *Mirror of Justice*, which as Lord Coke says—though composed in the reign of Edward I., by a learned and sensible man, treats of the laws and the ministers thereof, long before the Conquest. This is shown by internal evidence, and it has this peculiar value, that while it states the law as it was when it was composed, that it also states the various ordinances by which the law had been altered from the Saxon times to the time of Edward I. It distinctly stated that it was compiled in the reign of that King—"the King that now is"—and it stated the law as it then was, but it also stated how it had come to be so, and gave the date of every ordinance by which, after Saxon times, it had been altered. Hence, the *Mirror* is of peculiar value, as showing the progress of our laws and institutions, and the influence of the Roman element up to the time of Edward I., when, as Lord Hale says, the frame was substantially settled. And it very plainly shows the influence of that element, using as it does, many of the terms and phrases of civil or common law; as, for instance, in dividing judges into ordinary and delegated, and in showing how the barbarous Saxon and Norman usages were gradually giving way to the intelligent judgment of sworn judges or jurors, subject to challenge or exception for just cause—the origin of our modern trial by jury—the basis of our judicial system.

It will be obvious that in any history of English law the great object must be to trace the influence of the Roman system upon the barbarous usages. But this object, though often indicated, had never been carried out. Hale had no idea of its importance in legal history, and, therefore, in his fragment on the subject, he said that he could see no good in trying to find out this or that piece of law was derived from the Romans. Lord Holt had a glimpse of the true idea when he said that as all laws, that is all laws worthy of the name, were derived from the Roman—the reason of laws must be derived from that source. A quarter of a century later, Duck wrote his learned essay on the rise and influence of the Roman law in England, but it was only an essay, not a history. The learned Pettingall wrote an elaborate treatise to show the analogy between the Roman *judices* and the English jurors, but that was a fragment and nothing more. Before the close of the last century, however, Reeves wrote his history of the English Law. But in the most essential quality of his History of Law, Mr. Reeves' work was most remarkably deficient. He often failed to show the original reasons and causes of ancient laws or institutions, and still more failed to show the causes of their gradual growth and change. He stated accurately enough what the law was at different periods, at which any formal or authentic exposition of it exists, as, for instance, in the reign of Henry II., in the treatise of Granville, or in the reign of Henry III., in the treatise of Bracton; and, as in subsequent periods, by great statutes or ordinances. But he failed to show how the law had become what it was at those periods, and why it was different at one period from what it was at another. And, in particular, he failed to trace out the various sources of our law, and the different influences which had affected its foundation and its growth. He did not go far enough back to find all the original sources of our institutions, nor follow the channels through which they operated in later times. He gave little attention to the Saxon period of our history, and none at all to the Roman. He hardly noticed the col-

lection of Saxon laws made in the reign of Henry I, and failed to observe how it illustrated the combination of Roman and Saxon elements in the formation of our law. He copied the whole of the works of Glanville and Bracton, but failed to observe how they illustrated the same process. As to the *Mirror of Justice*, probably from its being written, not in Latin, like the others, but in the barbarous, obsolete Norman dialect, he evidently had not read it, and knew nothing at all about it. He had derived his only idea of it from Hickes, whom he often quotes, and who being not a lawyer, but only an antiquary, failed to understand it. Hence, he did not notice it at all in his hasty view of the Saxon period, and only noticed it thus in the reign of Edward II.

"The *Mirror of Justice* is a book whose consideration may properly belong to this reign. This singular work has raised much doubt and difference of opinion concerning its antiquity. Some have pronounced it older than the Conquest, others have ascribed it to the time of Edward II. Both opinions may be partly right. There may, perhaps, have been a work by this name as early as the date supposed; but whoever judges from the internal evidence of the book, will be satisfied that great part of it is of a period much later, certainly after Fleta and Britton, for it states many points of law, as it were, in a state of progression, somewhat receding from those writers, and approaching nearer to those of later times. Andrew Horne, whose name it bears, might take up an ancient book and work it into the form we now see in the reign of the King, or at the end of the former, and if so, we should expect that whatever it propounds, was actually law in the reign of Edward II."

Thus Reeves had taken so little notice of the book, that he had not observed that its author states it was written in the reign of Edward I. He goes on:—"The book treats of all the branches of the law, whether civil or criminal. Besides this, it gives a cursory retrospect of some changes ordained by some Kings."

Here again, it is obvious Reeves had not read the book, for it mentions under each head, every ordinance by which the law had been altered after Saxon times, that it is so more precise and specific, in an historic sense than any book in the law. Yet so little did Reeves know of it that he went

on to say :—" This book should be read with great caution, and some previous knowledge of the law as it stood about the same period, for the author certainly writes with very little precision."

On the contrary, the author writes with more precision, and in particular historic precision, than any other. And, therefore, it is manifest that Reeves had not read the book with any care, or with any adequate knowledge of the law, as it stood about the same period ; though what period this meant he evidently had no definite idea, as he had not found out when the book was compiled. " This, with his assertions about Alfred, and the extravagant punishments inflicted by that King on his judges, have brought the Treatise under some suspicion."

Here, again, it is obvious that Reeves had never read the book, for it contains no assertions about Alfred, which do not quite accord with what is known of that King by everyone not grossly ignorant of his character, his history, and his laws ; and the passages referred to are just those which bear the clearest marks of authenticity. All this, however, had evidently escaped the attention of Mr. Reeves, who goes on to say :—

" When read with these hints, the *Mirror* is certainly a curious, interesting, and in some degree, an authentic tract upon an old law ; though, considering the anachronisms in which it abounds, that the antiquated law is promiscuously blended with that of the time in which it was revised ; and that the date of such revision is very uncertain, it is to be wondered at that some great writers (Coke and N. Bacon) have relied so much upon the author as to pronounce on the antiquity of many articles of our law, merely on its authority."

But the difference between them and Reeves was that they knew the work, and he did not. It is plain he had not studied it. The passage above cited plainly showed that Reeves knew nothing of the *Mirror*, and had never read it. For, upon the face of it, the author distinctly states that it was written in the reign of Edward I., whom he mentions " as the King that now is," and so far from stating law " promiscuously," on the contrary, throughout, it carefully, and expressly

distinguishes the laws and constitutions which existed in Saxon times from those which existed in later times, and mentions the ordinances by which they were altered. This, however, was lost on Mr. Reeves, and hence, his history of our law, however accurate in its different parts, failed to show its growth and progression. It showed, with great accuracy, what it was at different periods, but it did not show the connection between them. It gave the whole of Granville at one time and the whole of Bracton at another, but failed to show why the latter differed from the former, or why he ceased to influence the formation of our law. He described very accurately the system of Ecclesiastical Courts as it existed in the 15th century, but it never occurred to him to trace its influence in the Courts of Equity, or the influence of equitable jurisdiction upon the legal law, nor to trace the channels through which the influence of reason, embodied in the Roman law, by degrees reached, permeated, and improved, the barbarous traditions and institutions of the Common Law.

• It is obvious that the great object of any new edition of Reeves' History must be to supply, as far as possible, this deficiency in it, to throw more light on the original sources and elements of our law, and to trace its progress and its growth. A good illustration of the fatal defect in Mr. Reeves' character as a writer of legal history is afforded by the way in which he deals with the important subject of trial by jury. Utterly unaware, on account of his neglect to study the Saxon laws and the *Mirror*, of the origin and growth of that mode of trial, and evidently unaware that the jurors, until later times, were mere witnesses, he says that the earliest mention of a trial by jury is in the Constitutions of Clarendon in the reign of Henry II., which direct that the sheriff shall swear twelve men who should make the truth appear "*faciet jurare duodecim legales homines, quod veritatem secundum conscientiam suam manifestabunt.*" Yet this was exactly what was directed by the early Saxon law, and the very term *legales homines* was the Latin version of the Saxon

phrase *lahmen*, which was originally synonymous with compurgators, just as compurgators were identical with jurors. And it was not until ages after the time of Henry II., that jurors exercised the functions of modern juries in hearing and deciding upon the evidence of witnesses. The progress of institutions Reeves could not understand, and so he set down the first formal mention of twelve men he happened to find, which happened to be some centuries after the original institution arose, as the origin of trial by jury.

When Mr. Finlason, on account of his known familiarity with the sources and history of our law, which had been his constant study for a quarter of a century, was invited to edit Reeves's *History of the Law*, he proposed to work upon that principle, and by the light of his own study of the original sources and authorities of our early law. The learned editor of Glanville had introduced his work with a passage which appeared to present the true idea of legal history :

“The law of modern times is intimately connected with that of our forefathers, and the decisions of the present day are not unfrequently built upon principles that are enveloped in the mists of far distant ages. But to these principles the student must ascend if he would merit the name of a lawyer, and if the labour be severe, he must reconcile it to himself, by reflecting that it was submitted to by Coke, Hale, and Blackstone. Led by the soundness of their judgments to investigate the earlier ages of our jurisprudence, these great men considered nothing useless, though it might possibly happen to be obsolete, which tended to enlighten their minds, and show them the fundamental principles of those laws which they so admirably illustrated.”

And this learned writer well carried out his own idea by bringing ancient Saxon, Roman, and Norman authorities to the illustration of the work he edited, and among these were the Saxon Law, and the Roman Law ; and those interesting records of our law which show the influence of both, the *Mirror of Justice* ; Britton, Fleta, and Bracton. Nor was it only English authorities which Mr. Finlason followed in his edition of Reeves's. He followed the example of Savigny, and the principle laid down by the German jurist, Guterboch, who has given us a valuable work on Bracton :—

"The historian must follow through the Saxon and first Norman periods the traces of what was left behind by the Romans; he must study the return of the Roman law, and the growths and effects of the new school of civilians; he must investigate the penetration of the Roman elements into practical usage, and the influence upon the different branches of the English law, just then developing. He must then show, how the full development of the national law, and the confidence felt in the strength and capacity to stand alone, produced an antagonism between it and the Roman law, which drove the latter from Westminster Hall; and how the Roman law, nevertheless, gained ground in the Ecclesiastical Courts, and in the system of equity."

Which was just what Reeves had failed to do, and what his Editor strove to achieve.

• The passage, copied from Gutterbock's work, exactly expresses Mr. Finlason's view of the history of English law, and the view upon which he edited Reeves. It is manifest that it is equally applicable to the administration of law in the courts as to the development of law which was carried on in those courts. And he applied the same view to our system of judicature and procedure, and especially to trial by jury. Mr. Finlason, therefore, executed his work upon these principles, and by the light of these authorities. For more than a quarter of a century, he had been familiar with the original sources and authorities of our early law, and he used his own knowledge of them with such casual light or illustration as might be gained from works such as those of Kemble and Palgrave, as to Saxon law, and Savigny or Guizot as to Roman; but working chiefly on the original authorities themselves. His own knowledge of these sources and authorities had enabled him to test their value by comparison, and he had long known the peculiar value, for the purposes of legal history, of the *Mirror of Justice*. So far as regarded the Saxon period of our history, there were the Saxon chronicles and the Saxon laws, by which to test it, and, tested by these authorities, as well as by internal evidence, its authenticity was undoubted. Thus as to the administration of justice, it represented the trial of criminals as tried by twelve sworn witnesses called jurors, or compur-

gators, and the same usages are found described in the early Saxon laws, and in the documents published by Kemble or Palgrave. Again, it represented these trials as presided over by local judges, "reeves" or bailiffs, and such judges are mentioned in the same sources of Saxon history. Again, its definition of crimes, especially such as to mayhem or burning, tallied exactly with the terms of the Saxon laws and the incidents of Saxon histories. Lastly, it mentioned that Alfred executed a great many local judges who had executed prisoners with wilful injustice or illegality, and it is stated by a contemporary writer that he was a severe enquirer into unjust sentences and his own laws, which sternly lay down the Mosaic principle of retaliatory justice; declare that those judges who wickedly put others to death, shall themselves suffer the same penalty. The Saxon portions of the work are thus abundantly confirmed, and the Norman parts of it are equally attested by their agreement with Glanville. Mr. Finlason, therefore, had, from long and careful study of the work found it well worthy of attention. There was no difficulty in discovering and distinguishing the later or Norman parts of it, for they were all expressly mentioned and pointed out. He gave copious and careful analyses of it, and copious extracts from it, and found it of excellent use in illustrating that important period of our legal history, which lies between the Saxon age of the era of the Great Charter; the confirmation of which in the reign of Edward I., forms a great epoch in the history of our law. That era he also illustrated by a similar use of the original sources and authorities; the Rolls of Parliament; the Charters; the works of Britton, Fleta, and Bracton; and the subsequent periods in the history of our law he also illustrated in like manner from the original sources, and in particular, by hundreds of citations from the Year books and later reports.

All this labour was cordially appreciated by English reviewers; for whose kind and handsome notices of his work Mr. Finlason will ever feel grateful; and not the less so because they were accompanied with the frank and candid

notice of some symptoms of haste and consequent inaccuracy. These defects in the execution of his work, the editor cheerfully acknowledges, and would be ashamed of himself for feeling any annoyance at their being pointed out in a spirit so frank, so generous, and so kind. There has lately appeared, however, in a German organ of criticism, a review of Mr. Finlason's edition of Reeves, marked by a very different spirit and character, and equally characterised by ignorance, flippancy, and untruth. It is extraordinary that such a production should have appeared in a German critical journal, and still more so that it should have been thought worthy of translation and insertion in such an able legal periodical as the *American Law Review*. To the frank and candid criticisms of the English journals the editor bowed because he saw that they were the productions of men of learning and ability, and were marked by justice and by candour. But for the critique of the German writer, he can entertain no other feeling than contempt, though he feels it a duty he owes to his own reputation and to legal journalism, to inflict upon it the chastisement of an exemplary exposure. It is manifest, at the outset, that the critic is quite incompetent to deal with such a work, for he says:—"Reeves has used the sources which were then accessible to him in the most thorough and comprehensive manner." Which, as we have seen, was just what Reeves did *not* do, for he made little of the Saxon laws and nothing of the Roman; he made nothing even of the *Leges Henrici Primi*, and he made no comparative or historic use of Glanville or Bracton, and he did no more than simply copy them into his pages. And he did not, as has been shown, even take the trouble to read the *Mirror*, the most valuable monument of our early legal history. In truth, he had not an idea of what is meant by the history of law, and so could make nothing of its sources. The German critic has an idea of legal history, for he is able to perceive that Reeves had *not*. In this respect he agrees with Mr. Finlason, and says:—"Reeves did not fully understand the growth and development of legal

institutions, and therefore he paraphrased the sources." In other words he merely copied out Glanville and Bracton, and omitted all notice of the only work which would have given him an idea of the progress of laws; that is, he had not an idea of legal history. But the German critic, who has an idea of it, is in utter ignorance of its sources; at all events, so far as regards English law. What he may know of his own, we know not, but there is an absurd presumption in his assuming to criticise a work on the history of English law, of the sources of which, it can easily be shown he knows absolutely nothing.

It should seem that the Germans have but very lately betaken themselves to the study of the history of their own laws, for Niebuhr observes, after reproaching historians of other nations for not having attentively studied the ancient law books—"But after all, we have not ourselves fared better, for it is now scarcely fifty years since Möser published his first works, stimulated by which we have at length began to have a clear perception of the early institutions of our own country." That is, they have "only just begun" to acquire any knowledge of the history of their own law. They can hardly be qualified to criticise the labours of those foreigners who have devoted a life-time to the study of the history of their laws and institutions. Yet this is what the German critic has had the presumption to do, though his own incapacity for the task is made flagrant by his own criticism. At the outset he betrays what might be safely predicated, that he has no original knowledge on the subject, that he knows nothing of the original sources and authorities of our law, and has taken his notions of it at second-hand. His main accusation against Mr. Finlason is that he has worked from his own study of the original sources and authorities, and has not, as the critic evidently has, taken his knowledge from modern German books! This is actually betrayed at the very opening of the critique, for the critic proceeds thus to assail 'Finlason:—"It was not to be expected that a new edition provided in English fashion with editor's notes,

would give to this solid work the form demanded by a genuine historical conception."

That is, it is presumed, it was very difficult to make a good work out of a bad one, which is true; but Mr. Finlason did his best. His labours, however, are vain, because he did not work from German sources. "Those of us who were inclined to be sanguine, took up Finlason's edition, in the hope that the essential relations connecting the development of English law with German and Franko-German law would be indicated with reference to the sources."

The scope of Mr. Finlason's notes, no doubt, had been, on the contrary, in accordance with the views of Hallam, and all sensible historians, that the Saxons who settled in this country were barbarians, who had no idea of law at all, and he certainly did not connect the development of law with German sources. Nor would any German who had any knowledge of the history of his own country, ever dream even of associating the development or growth of law, even in that country, with German sources. The great Emperor Charlemagne, to whom we owe the reconstruction of modern society, made the Roman system his model, and strove to reproduce it in its vast dominions. And at least one of our Saxon kings learnt, at his court, by the great Emperor's example, to strive to improve the laws of his barbarous subjects by influences derived from the same source. It is strange that a German writer should be unaware, that it was from Roman, not German sources, that law and civilization proceeded, since it was the great object of Savigny to establish that fact. The German critic, however, does not mention Savigny, though he mentions some German writers of far less importance, and whose imperfect knowledge of English law has long been known. The German critic is angry that the result of German works upon English and Anglo-Saxon law were not noticed, as, for instance, Schmid and Beiner. But as to these, Mr. Finlason was well aware that they had fallen into the error of Reeves, and had failed to notice the progressive and general change of law. Thus

it was pointed out, thirty years ago, that Schmid had given little attention to that remarkable collection of Saxon laws, known as the *Leges Henrici Primi*, because compiled in his reign, but left unregarded by Reeves. It was too much to expect from German authors greater knowledge of the sources of English law than our English writers on the subject had shown. As to Beiner, for instance, although his knowledge of English law was, for a German, considerable, it was so imperfect that a recent English translator of Gutterbock excuses himself from entering into Beiner's views, because he was compelled to differ from them so materially. Here we may pause to admire the mingled absurdity and presumption of a German critic, censuring an English lawyer for taking his knowledge of English law from its original sources, instead of being content to take what he could get at second-hand from obscure German writers! Probably in the whole history of criticism, there never was such an astounding exhibition of folly and presumption! It is a folly and presumption of which any learned German would have been ashamed. Gutterbock, for instance, excuses himself from pursuing his enquiries beyond Bracton, "because such a task would require a residence in England of some duration." But fools rush in where men of great learning hesitate to step, and the obscure German critic, who evidently has not read even German works upon the subject, is not ashamed to criticize, in a spirit of shallow scorn and ignorant contempt, the work which embodies the studies of an English lawyer's life! Such presumption, of course, is accompanied with corresponding ignorance; for ignorance is blind, and the exhibition of ignorance made by this presumptuous writer, is something perfectly scandalous in any one assuming the critical office and function. The German critic goes on to quarrel with 'Finlason' for upholding the importance of the influence of Roman law in England. He says: "German jurists would be the last to deny to Roman law an indirect influence upon English law. But they do not look for this influence where Finlason is especially fond of tracing it, in

the domain of public law, but rather in the judicial treatment of individual principles of private law."

So much the worse for them if they do not. The reason would be ridiculous, even if it were true in fact; for what could be more presumptuous than to restrict or measure the researches of English lawyers in the sources of their own law, by the views of German writers! But what is to be thought of a German critic writing in this way, apparently without any notion that the grand object of Savigny's greatest work is to show the influence of Roman law in the domain of public law and institutions. The German critic sneers with shallow and narrow-minded self-sufficiency at the great French writer Guizot, evidently unaware that Guizot, upon this subject, avowedly followed Savigny; and that Finlason's study of the German jurist satisfied him that he might safely follow his own views, sanctioned, as they were, by the authority of the two greatest writers on the subject. The truth is, however, that the German critic knows very little of the works of his own countrymen on the subject, and is not acquainted with German works familiar to students of legal history in this country. The German critic, in his usual style, says:—

"Bracton, of course, with his Romanising tendencies, is water for Finlason's well. It is surprising, on the other hand, that he should be totally ignorant of Güterbock's monograph, 'Henricus de Bracton und sein Verhältniss zum römischen Rechte,' a book that has been translated into English."

It would not be so very surprising, even if it were true, which it is not; but what is surprising is that a German critic, in the same sentence, sneers at an English writer for tracing English law to a Roman source, and also for assumed ignorance of a German work, the whole scope and subject of which is to establish that connection! Finlason might justly retort upon his German critic the charge of ignorance of the German work, which shows, at all events, so far as Bracton is concerned, a very large infusion of Roman law. The German author referred to was but following the foot-

steps of his author Reeves, and by other learned writers, for instance, Spence, who refers our Equity system to a Roman origin, and whose view, it is clear, were approved by the German writer. For Guterbock adds :—

“The best that has been written is still to be found in Reeves' History of the English Law, Vol. I and II. Spence, in his work upon the Equitable Jurisdiction of the Court of Chancery, which is of great importance, for the History of the English Law, has paid much attention to the history of the Roman Law in England, and has 'made researches upon many details of the subject.'”

Now Spence traced the origin of the Equitable Jurisdiction through the Ecclesiastics to the Roman system, the Chancellors for many ages having been Ecclesiastics, and naturally introducing their own ideas of law and procedure. And in the same way Mr. Finlason traced the influence of the Roman system through the same channels, upon the formation of our English system, even in the institution of trial by jury. He, therefore, followed Spence.

The German critic, when he sneers at 'Finlason' for tracing Saxon institutions to a Roman origin, does not know that Finlason follows German authorities; for instance, Guilds, as Guizot says, are generally considered as of Saxon origin, yet they are undoubtedly of Roman origin, and must have been derived by our Saxon ancestors from their Roman predecessors in this country. Mr. Finlason, being satisfied that on this point Guizot was right, followed him in this, as in other matters. The German critic sneers at him for so doing; but let us listen to a German authority—the highest upon such a point—Niebuhr:—“There existed at Rome from the earliest, certain guilds, the institutions of which was ascribed to Numa.” They included, he adds, the principal trades; and “the object,” he says, “was to give to the city trades a corporate existence, as in the middle ages.”

Here, then, is the highest German authority on Roman history, against the conceited German critic, who insists on measuring the knowledge of other men by his own, and to assume that nothing can be true of which he does not

happen to have been informed. It is not likely that the Saxons, who were, as Hallam says, mere barbarians, should have originated these useful institutions, but at the same time they had the good sense to borrow them, and continue them; and they were the germs and originals of all our guilds and civil corporations.

Again, the German critic is extremely angry with Finlason for discussing the Roman judicial constitution, especially for making the *judices facti* the prototypes of English jurors. But here the German critic, through pure ignorance on the one hand, and wilful inattention to the author on the other, falls into utter confusion and error. He evidently fancies the Saxon jurors and the modern English jurors the same, and then easily accuses Finlason of error in likening the Roman *judices* to the former. But Finlason does no such thing; he compares them rather with the latter; just as Savigny compares them with the German judicators, the *scabini*. That is, Finlason finds in the Roman *judices* the prototypes, not of the Saxon jurors, who were mere witnesses, but of the selected judicators, instituted by Charlemagne upon the Roman model, and the jurors of later English times—that is, men selected and sworn to try cases *on evidence*. The German critic is so ignorant as to think this is a new view! Why, a century ago—as far back as 1769—Pettingall published his learned “Enquiry into the use and practice of juries among the Romans, from which the origin of English juries may properly be deduced;” that is the modern, not the ancient compurgators, but the juries which arose in a later age, deciding upon *evidence*. Savigny, after pointing out the identity between the *boni homines* (the very phrase used in the English law to designate jurors) and the judicators, under the German system, corresponding to the *judices selecti* of the Romans, proceeds to remark: “It is remarkable that the right of the juries of England is in an essential particular different from the Germans, and accordant with the Roman system.” Spence, also a man of immense learning, took the same view. The selected judi-

cators of the Roman system are seen at this day in the nautical assessors of the Admiralty, and the Roman system, on which the Roman judges in criminal cases were chosen was substantially similar to our own jury system.

Again, in the Roman criminal form, trials in the formation of the jury or judicial body, taken by lot, (*sortitio iudicium*) from the general body of qualified citizens, there was the right of challenge, exactly as in the English system, and it can be shown that this also was taken by the Saxons from the Romans. The accuser and the accused, under the Roman system, had the right of mutual challenge or objection to such particular persons as judges (*Cic. ad Att. l. 16.*) The same system is to be traced in the Saxon laws, (though the early Saxon jurors were compurgators), and in Glanville and Bracton. Mr. Hallam even recognizes that in Saxon times there is mention of juries chosen by both sides (ii. 284). This had not escaped the notice of Montesquieu and Guizot; and the German critic, who sneers at them, has not acquired even their measure of knowledge. This is the more discreditable to him, because more than one German writer in our own times have fully explained the system, and shown, how closely, as Montesquieu had long ago pointed out; it resembled the English jury system. (Goettling, *Geschichte du Rom Staats verfassung*, 4.) Walter, *Geschichte des Rom. Rechts*. Fegerstiom *De Judiatres apud Romanos*. Thus Mr. Finlason's views on the subject are those of the latest and best German writers; all ignored, however, by the learned German critic!

The German critic, however ignorant of all this, blindly follows Reeves, who tells him that trial by jury was instituted in the reign of Henry II., probably having in his mind the institution of the grand assize mentioned by Glanville, and confounding it with trial by jury, whereas it was only a mode of ascertaining the testimony of the neighbours on the question, a method known for ages before the Conquest, and the only sense in which it was instituted under Henry II., was in its being substituted, at the option of the

tenant for the duel, or trial by battle which the Romans had substituted for the ancient English mode of trial. But that, on the other hand, was only a trial by witnesses or compurgators, and was not at all like the modern trial by jury, inasmuch that Glanville himself speaks of the champion who waged the "duel" as a juror, exactly as in the *Mirror* the same expression is applied to the champion or the compurgator. This is one amongst numerous instances of exact accordance between Glanville and the *Mirror*, showing the authenticity of the latter, and fully justifying its copious use by the learned Editor of Glanville by way of illustration or commentary.

The German critic, however, is most scornful and contemptuous about Finlason's use of the *Mirror*. Let us test the German critic's knowledge of the subject; we shall find him as ignorant of it as every other. He says, speaking of the 1st and 2nd volumes of the work:—"In nearly all the notes the *Mirror of Justice* is cited as an authority." This, as a simple matter of fact is untrue, it is not cited after the reign of Edward II., where Reeves erroneously notices it (rather early in the 2nd volume) and it is cited only occasionally during the period to which it really relates, from the Saxon age to Edward I. The German critic, however, knowing nothing about it, follows Reeves blindly. "The *Mirror* is a legal source of Edward II. time, and parts of it are of very doubtful worth. Together with much valuable information, it contains numerous statements about the historical origin of legal principles, which have the stamp of falsity on their face." This sentence plainly shows that the critic has never seen the *Mirror*, and that he is only expanding the erroneous passage in Reeves, from which he has taken his idea of it. The whole statement is unfounded. There is not a particle of truth in it; nor in what follows:—Institutions, which according to all trustworthy evidence, were established after the Conquest, especially in the reign of Henry II., are referred back to the Anglo-Saxon period, and then

of course, the credit of originating those much admired Norman institutions is given, by tradition to Alfred the Great."

Here, again, if there were nothing else to show it, there is ample proof that the German critic has never looked at the *Mirror*. There is not a word of this statement which is true—not a single word. The name of Alfred is only mentioned in the entire work two or three times; and in not a single instance as the founder of any institution at all! No Norman institution is referred to Saxon times, but, on the contrary, the reader is told clearly that the institutions mentioned had clearly all of them been altered and established in Norman time and the ordinances of Henry II. and even Henry I. are carefully mentioned, showing how the Saxon laws had been altered. Here, indeed, as already pointed out, is the value of the work, and for this reason it was so copiously cited by the learned editor of Glanville, and by Mr. Finlason in editing Reeves. And this German critic, evidently in utter ignorance of the edition of Glanville, published half a century ago, and which teems with citations from the *Mirror*, has the incredible, presumption never having read the work himself, to sneer at an English lawyer, who, after twenty years study of the book, has made a use of it, for the purpose of illustration, sanctioned by the example of the most learned lawyers of his age! Surely this is a rare display of impudence and imposture!

But let us go on, for this is an imposture which, on account of its impudence, ought to be unsparingly exposed:—"That the author should have a special fondness for the *Mirror* is easily intelligible, for its fictions chime in with his view. They show the existence in the Saxon period of the later English institutions." The truth being that they show nothing of the kind, but exactly the reverse, carefully and expressly pointing out that such and such an institution was of later origin, and showing how it differed from the earlier, nine tenths of its contents, referring the institutions described to Norman, not to Saxon

times. A more ludicrous exhibition of ignorance never was displayed in the form of a criticism. And the fun of the thing reaches its height where the presumptuous critic proceeds to assume the airs of a man who has mastered a work which it is plain he has never seen; and to lecture a man who has shown himself a perfect master of it in these terms—“Finlason several times reproaches Reeves while correcting him for not having reading read the *Mirror*. Reeves was certainly thoroughly acquainted with this source. We could wish that Finlason had read the work he edited to as much purpose as Reeves read the *Mirror*.”

The German critic; it is clear, had not read as much of the *Mirror*, as Reeves, who had probably scarcely read the first pages of it. The German critic has copied what Reeves wrote of it, and can say no more about it than to repeat or expand what Reeves had written of it. Those who have read Mr. Finlason's notes will have seen that he at all events had made himself perfect master, not only of the *Mirror*, but of the Saxon laws, and all the monuments of our legal history during the Saxon and Norman periods, and they will have no difficulty in seeing that his account of the subject, is far more likely to be correct than the German writer's, who had evidently known nothing about it. The German critic was impertinent enough to say that Finlason is not acquainted with the works of Kemble and Palgrave. But here, again, in assuming Mr. Finlason's ignorance, he only betrays his own. It happens that the very works mentioned, more than any other modern publications, uphold Mr. Finlason's conclusions, especially as to the value of the *Mirror*, and the origin of real trial by jury. In the *Codex Diplomaticus*, for example, is to be found repeated instances in which the king's thanes, or earls, are called *comites*, or companions of the king, &c., which is the term used in the *Mirror*. But then there are similar instances in Bede. Kemble, and Palgrave of course could only work from the original sources of Saxon history and laws, and with which any student of Saxon history would be familiar, and

it is only the ignorance of the German critic which makes him fancy that those writers disclosed anything new, or added materially to the knowledge of those who studied the original sources and authorities, and with which even students of Saxon history would be familiar. In the *Codex Diplomaticus* again, are to be found instances of appeals to compurgators who were the jurors in Saxon times, and in Palgrave's great work similar instances are given. These instances, indeed, only corroborate the evidence afforded by the Saxon laws, with which Mr. Finlason was long ago familiar, and added nothing to his knowledge on the subject. But as far as they go, it will be seen that they quite confirm his conclusions, and what is to be thought of a critic who represents, probably in utter ignorance of these works, that the author whom they entirely confirm, fell into error, because unacquainted with them. "Enough has been said to show that the editor is a stranger to the German and English law, and that Kemble and Palgrave have written in vain so far as he is concerned." Substitute for 'Finlason,' the German critic, and the sentence will be truth. It is manifest that the German critic cannot have read these works, or has not understood them, for they entirely support Mr. Finlason's views. The idea that *he* had not read works published thirty or forty years ago, is as absurd as that any student of the original sources of Saxon law could derive much new information from them. No one who has read them, or who had any knowledge of English law, could fancy them, as the German critic evidently does, authorities on the history of our law. Incidentally they contain some illustrations of it, but their readers know that their scope is rather the history and antiquities of Saxon times, than the history of English law, and the German critic betrays his own utter ignorance both of English law and of the works to which he refers in supposing them to be connected. Moreover, no student of the history of law would ever dream of taking his authorities from modern works! Here, again, the German critic betrays not only his ignorance, but his incapacity for knowledge.

The German critic, having no real knowledge of the original sources of our law, is obliged to cling closely to Reeves, and yet does not always understand him. Thus, in chapter 11, Mr. Finlason observed in a note :—

“ The author heads this and the next two chapters alike, William I to John—thus treating the whole period as one, and mixing up the events of it without distinguishing the important era in the history of our law, which is marked by the reign of Henry II. The second of these two chapters therefore ‘ (i.e. chapter 3 and 4) ’ is entirely devoted to the law as it was in the reign of Henry II., and therefore it appeared better so to entitle the chapter of that reign, and to entitle the present William I. to Henry II.”

That is, not as entirely or exclusively applicable to the period anterior to Henry II., but principally so ; and of the topics treated of in the chapter, there is not one which had not its germ or beginning in time, anterior to that reign. Then coming to chapter 3, the one he had already mentioned as devoted to the state of the law in the reign of Henry II., Mr. Finlason so entitles it. The German critic quarrels with this as interfering with the integrity of Reeves, but he had evidently not read Reeves, for Reeves himself in effect so describes the scope of this chapter, and he says in this chapter that some point of line between the conquest and the reign of John should be chosen, and the contemporary law of that time stated in all its branches, and then, he says, that :—
“ The new jurisprudence seems not to have been thoroughly established, or at least literally explained, till the reign of Henry II., when we meet with the treatise of Glanville. The scope of that work marks the reign of Henry II., the most favorable period for our purpose ” (p. 151.) So that Reeves himself described the scope of the chapter exactly as Mr. Finlason has done.

But there is something better still behind. Take another specimen of the German critic’s *acumen* :—

“ The following instance taken at random, illustrates the pedantic narrow-mindedness of the Glossarist (?) Glanville speaks once of *avunculus ex parte patris* and *ex parte matris*. That grates against Finlason, who has his school boy’s Latin still in mind, as an incorrect expression. *Avunculus*

must mean maternal uncle. The proper word for paternal uncle would be *patruus*. Reeves must have carelessly overlooked this. Did Finlason ever ask himself the origin of the word 'uncle,' which certainly means *patruus* as well as *avunculus*? Ought not the English word to have suggested the fact that the mediæval Latin of England and France, when it is imitating a Roman model, employs *avunculus* in the sense of *patruus*?"

To be sure, no doubt, and that was the very reason why, to a modern reader, it was necessary to point it out. In the time of Glanville, the law of succession being still unsettled, the distinction was not drawn between the uncle on the father's side and the mother's, and, therefore, he used the same term for both. And Reeves, a mere copyist, followed him in his error. But the learned editor of Glanville, whose work the German critic, it appears, has never seen! pointed out the error, and Mr. Finlason took care to point it out, too. He imagined that his work would be read by men who had, at all events, a knowledge of the elements of English law, and, therefore, he did not think it necessary to explain what the German critic evidently does not know, that the uncle by the father's side—the *patruus*—would ordinarily succeed, according to the modern laws of descent, before the *avunculus*; rather an important difference between them, of which, however, the German critic evidently is not aware.

The German critic further says: "The Editor should have noticed the late special English works, and the publications of historico-legal sources issued by the Record commission." What the critic knows about them is shown by what follows: "It was especially surprising to us to notice that the year books are made to begin with Edward II., in utter disregard of Horwood's edition of the Year book of Edward I."

The Year books are "made to begin with Edward II.," because the published series does begin with that reign, and there is no mention of "Horwood's edition of the Year books of Edward I.," because there was no such publication. The

book referred to and of which the German critic had heard, was merely a publication of two or three years of that reign, rather curious as specimens, than throwing any additional light on our legal history, and containing nothing not known to students of the Year books of Edward II. The German critic also professes his surprise at finding no mention of Nicholls' edition of Britton, as if it added anything to our knowledge of the work! One more illustration of the German critic's honesty. He complains of 'Finlason' for not using the publications of the Record Commission, of which the two principal and most important are Thorpe's "Ancient Laws and Institutes" and the Welsh Laws. Yet the first of these works is mentioned and quoted in almost the first page of Mr. Finlason's Edition of Reeves and is largely quoted through the earlier chapters; and the critic, on the other hand, sneers at him for using the Welsh laws, which it plainly appears, the critic was not aware of the publication!

But thus it is with the German critic, from first to last, it is manifest that he has no knowledge of the sources of our law, and that his only idea of knowledge is of that derived at second-hand from mere heresay. It is, therefore, only with mingled sentiments of amusement and scorn that one reads his final judgment of a work of which he is so obviously incompetent to judge, and his criticism of which, disguising as it does utter ignorance of the subject, by the assumption of an air of scorn, is neither more nor less than an audacious piece of literary imposture.

II.—MICHAELMAS TERM AND SITTINGS.

IN pursuing our retrospect of the business and sittings in all the courts during the last Term and sittings, we desire to say that one of our reasons for it is that there are many cases which are not reported in the law reports, at all events, not in all of them, but of which some notice, however brief, should be taken.

Recommencing with the Court of Appeal in Chancery, we have to notice that before the full court, the Lord Chancellor, and both the Lords Justices, a case arose which illustrated the true doctrine as to contempt of court—that it is a wilful disobedience of the writs or orders of the court, or a direct obstruction of its proceedings. The particular case was of the former class, and the court said there was no wilful breach of the order, and, therefore, no contempt. (*Witt v. Corsoran*, December 3.) This is the true doctrine: all decided cases, except one or two recent cases in the Queen's Bench, can be reduced to this principle; any *dicta* which go farther are not law; there is no difference in this respect between superior and inferior courts of record; and indeed, the Court of Queen's Bench itself has since held that an inferior court of record cannot commit for contempt, out of court, where it is not a disobedience to its writs, or actual obstruction of its process.

In a railway case before the full court, a transaction between the auditors and secretary as to cancellation of shares, to release the holder, was held invalid, "as such a transaction could only be supported on the clearest evidence of authority and honesty." (*Re Holyoake Railway Company*, December 10.) The inconvenience arising from the Lord Chancellor sitting as a judge of first instance, was illustrated in a case in which the Lord Chancellor, sitting for the Master of the Rolls, refused an injunction, and afterwards the new Master of the Rolls granted it. The party appealed, and the full court

reversed his order. No doubt, the Lord Justices sat with the Lord Chancellor, but it is evident that it was hardly satisfactory. (*The Metropolitan Railway Co.*, December 17.) In a case of obstruction of lights, in which the Court of Appeal had, as the Vice-Chancellor had done, to determine as to the effect of the scientific evidence, and deemed the obstruction not made out; it was objected that the building was completed, but the Lord Chancellor said that this in itself, was not conclusive; the Court would not order a completed building to be removed, except in extreme cases; but it could do so. The court, at all events, could give damages in such a case, and it was desirable that the Court should assess damages in order to prevent repeated actions at law. (*The City of London Brewery Co.*, December 4.) A case came before the Court of Appeal in which they had to decide between two conflicting views, taken by Lord Romilly and the Vice-Chancellor, as to the effect of the common covenant in a settlement, "that in case, after the solemnisation of the marriage, Mr. or Mrs. A——, or either of them, in her right, should become entitled to any moneys or other property then all such moneys or property should be vested in the trustees of the settlement." The husband died previously to his wife's title to the fund in question accruing. The petition asked that her share might be paid to her. Two cases decided by Malins, V.C. *Dickinson v. Dilwyn*, 39 Law J. Rep. (N.S.) Chanc. 266, s. c., L. R. 8 Eq. 546; *Carter v. Carter*, 39 Law J. Rep. (N.S.) Chanc. 268, s. c., L. R. 8 Eq. 551, to show that a covenant in these terms extended only to property to which the wife became entitled during the coverture. On the other side, a conflicting decision of Lord Romilly, M.R. (*Stevens Van Voorst*, 17 Beav. 305), was relied on. Their Lordships said that they had consulted the Lord Chancellor upon the matter; and he was of opinion, and they agreed with him, that the rule laid down by Malins, V.C., was the most consonant with reason, and should prevail. Accordingly, a covenant in these terms applied only to property to which the wife became entitled during the coverture, and Mrs.

Robinson's share in the fund was not included in her settlement, and must be paid to her. (*Ex parte Robinson*).

There was a very important case before the full court as to the jurisdiction of the Court of Bankruptcy, in which it was held, that, though that court has very large powers to decide all questions necessary for the proper administration of a bankruptcy estate, it does not enable the assignees to draw within the jurisdiction of the court the owners of property not vested in the assignees; and still less does it enable the court to work at a decree of the Court of Chancery (*Maule v. Davis*, December 16). This only carries out a former judgment of Lord Selborne's, in which the nature and bounds of the jurisdiction of the Court of Bankruptcy are defined in a very clear and masterly way. (It will be found in Messrs. Roche and Hazlett's last edition of their Laws of Bankruptcy, among the addenda prefixed to the work.)

The Chief Judge in Bankruptcy had to decide a question, which, he said, was one of great importance, whether, when in consequence of accident (as the admission of a very large debt against the estate) the assets become insufficient to pay the composition, which has been agreed to be taken, the majority of the creditors can consent to take less. The Chief Judge held that they could. (*Ex parte Radcliffe, in re Glover*.)

The Bankruptcy court is closely connected with Chancery: the Full Court of Appeal in Chancery, being the Full Court of Appeal in Bankruptcy. It is the only court which is always sitting. The registrars, as will be seen from the daily reports throughout the year, and unhappily never want business, every day see the bankrupts are examined before them, with the usual story: debts measured by many thousands, or tens of thousands of pounds, and assets comparatively small. The Vice-Chancellor (Bacon), Chief Judge, sat now and then as a Court of Appeal from the County Court judges or the registrars. In one of the County Court appeals the question was as to the validity, as against

creditors, of a marriage settlement which was to include "all future real or personal estate of the husband." The Vice-Chancellor held such a settlement invalid, as opposed to justice and the law; for, that a man could not be allowed thus to withdraw the whole of his property from creditors. *Ex parte Rolland Law Journal notes* 188.) The Full Court of Appeal in Chancery took appeals from Bankruptcy, either from the Chief Judge or the Registrars, once a week during the Term and sittings.

In one case before the Lord Chancellor and Lord Justice James, a shipowner claimed a lien for a sum of money which was to be advanced under the charter out of freight on the clearing of the ship, which cleared but never started, the charterers becoming bankrupt. The judge of the Manchester County Court held that the owner was not entitled to the lien claimed, and this decision was affirmed by the Chief Judge in Bankruptcy. The owner now appealed. Their lordships held that the ship, not having commenced her voyage, no freight had been earned or commenced to be earned, and there was, therefore, nothing in respect of which the ordinary mercantile lien for freight would arise; nor was there anything in the wording of the charter-party to show that the word "freight" was used in any other than the ordinary sense. And so the appeal was dismissed with costs. (*Ex parte Nyholme, re Childs, Law Journal notes*, 190.)

It is due to Lord Selborne to point out that he was the first to originate a practice of permanent sitting in chambers, most beneficial to the suitor. On the other hand, it is due to the Master of the Rolls to add that he has most cordially concurred and co-operated with the Lord Chancellor in carrying out this salutary practice. Thus we read in the *Times*, at the last day of the year:—

"His Honour sat to day for the first time in the vacation to take pressing applications at the Rolls' House, and will again sit on Wednesday next if required. Only a few applications were made on the proper occasion. The vacation sittings were inaugurated by the Lord Chancellor, and will be continued in the several vacations on Wednesday. Mr.

Church, the Chief Clerk at the Rolls' Chamber, heard a number of summonses for time to answer, &c."

The *Law Times* says :—

"We understand that the Master of the Rolls has signified his intention to facilitate in every way in his power the transaction of business in his chambers. This is most important, for, no doubt, many *ex parte* applications are made in the Chancery Courts which can be as well and less expensively made in the Judges' Chambers. We hope the Vice-Chancellors will follow the good example of Sir George Jessel."

The decisions of the Master of the Rolls are regarded with satisfaction as showing a robust good sense and firm grasp of legal principles. An information was filed to restrain the defendant from driving piles into the river Stour, at Sandwich, to form a platform in front of his quay and wharf. He defendant did not dispute that the Stour was a navigable river; but he contended that, as the platform he was making was only three feet broad, the matter was too trifling for the Court to interfere with. He also alleged, in justification of his acts, that the formation of the platform would enable him to land his goods easier and sell them cheaper, and thereby confer a public benefit on the neighbourhood. But this was bad law, and the Master of the Rolls, therefore, held that the benefit which the defendant said would be derived by the public from the erection of the platform, was not such a benefit as would justify the defendant's acts. He also said that on such a question as this, the Court would not consider the amount of the damage done; but seeing that it was an illegal act to place any obstruction, however slight, in a navigable river, the Court would restrain it. (*Law Journal Notes*.) The *Law Times* and *Law Journal* have repeatedly expressed their satisfaction at the vigour of Sir G. Jessel's mind.

In a case before the Master of the Rolls, as to the construction of wills, Sir G. Jessell intimated that he "should discourage citation of cases on the construction of other wills, except where some principle was laid down, or where some technical terms were defined or expressed," which was

the rule laid down by the House of Lords in the tending case, (*Grey v. Pearson*, 6 H., L. cases 61, 108), which is approved by the *Law Times*.

In a Charity School case, the Master of the Rolls decided some very important points; that the Charity Commissioners have jurisdiction in contentious cases, that they have power to appoint additional trustees without removing the old trustees;—that the power given to the majority, under the Education Act, did not make the appointment bad; and, lastly, that as the Commissioners had jurisdiction, the court would not interfere with their discretion, except in a gross case of miscarriage. (In *re Burnham National Schools*, *Law Journal* notes of cases, 185). His Honour had to declare a bequest for a very salutary object, providing a home for widows and families of military and naval officers, void, under the mischievous “Mortmain” Act, which is no Mortmain Act at all, but simply an odious, absurd, and injurious law against charity, under which a man may leave any amount of property to a concubine, but cannot leave an acre to endow a church, a school, or a hospital. (*Atherton v. Merriman*, December 15)—(see *Finlason, on the Mortmain Laws*, published 1853.) On a petition for payment of surplus proceeds of glebe vicarage land, sold for redemption of land tax, for the purpose of permanent improvements of the vicarage, his Honour held he had no power to make the order, and when reminded that other judges had made similar orders, observed that because other judges had exceeded their jurisdiction it was no reason why he should do so—(In *re Nether Stowey Vicarage*, December 13th). But if such is the law it is simply iniquitous and absurd, and ought to be altered.

Before the Master of the Rolls a case arose in which the decision in the celebrated leading case of *Tulk v. Moxhay* (as to Leicester Square) was carried out, and it was held that as one of the parties to a partition had got a benefit by an undertaking or condition, this imposed a trust on him and all claiming under him, with notice—a most important head of Equity. (*Webb v. Tulk*).

In another case, the Master of the Rolls declined by way of injunction to give the effect of a specific performance in a case where that relief could not, according to equitable principles, be given, as the breach of contract could be compensated in damages. (*Lord Abinger v. Ashton*, Dec. 12). "The court," said his Honour, "has no jurisdiction to compel specific performance of a covenant to repair, and, therefore, cannot restrain a breach of it by injunction." In a court of law, an injunction could now be obtained in such a case, if there was "a continuance of an unlawful and injurious act."

The Master of the Rolls, like all the other Equity judges, had more than one sewage nuisance case, and in granting an injunction against a Local Board of Health (?) for polluting a stream by sewage, observed that "there is a *vis inertia* about Local Boards which requires a great deal of pressure to overcome." (*The Attorney-General v. The Aylesbury Local Board of Health*, Dec. 17.)

The Vice-Chancellor had some very important cases to deal with. In a case in which it was necessary to take evidence in France, the Vice-Chancellor consented to request the Court of First Instance there to accept a commission to examine the witnesses on behalf of this court. (*The Imperial Land Company v. Maslerman*, Dec. 13.) This was confirmed by the Full Court of Appeal. It was the first time such a course had been taken in this country, and it was required, because there were unwilling witnesses, and an examiner would have no power to compel their attendance. The precedent is one of great importance, and, if followed, it will have salutary results. In a suit instituted as long ago as March, 1868, on behalf of infants, to set aside a contract entered into under the sanction of the court in 1868, for the purchase of an estate, on the ground of alleged fraud in the valuation, the parties were cross-examined in court upon their respective affidavits, and the Vice-Chancellor held upon the evidence that the fraud was not made out. (*De Witte Denne*, Dec. 10.) In one of the many cases which arose out

of the winding-up of the Hindustan and China Bank, a purchaser of shares, who had given in the name of an infant as the transferee, was held liable to the seller as the real owner and purchaser, and liable to indemnify him. (*Maynard v. Eaton*, Dec. 16. An action arose out of the same transaction in which a court of law held in the course of Term, that no custom justifies giving infants name in *vide post*.

An interesting decision was given by the Vice-Chancellor on the subject of testamentary gifts to illegitimate children, which the *Law Times* thus summarized :—

“The testator married twice. By his first wife he had two children, both of whom died in his life-time, one only leaving issue. By his second wife he had two children, both born before the marriage. By his will he gave to his wife power to dispose of his property among ‘our children,’ and in the event of her making no will, the property was to be equally divided between his ‘children by her.’ It was argued that by allowing the illegitimate children to come in under the will, the legitimate children would be excluded. The Vice-Chancellor said, however, that there is no rule to prevent legitimate and illegitimate children taking together as a class where it is intended they should do so.”

There was a case curiously illustrative of the modern jurisdiction of Courts of Equity, now concurrent with that of Courts of Law, but far more effective, to grant injunctions to restrain acts of trespass or injury to property without any colour of title. A person who, with his father, had been about 70 years in quiet possession, and who had proved this in an action brought against him a few years ago, had obtained an injunction to restrain a party who had cut down a tree and threatened to cut down others in order to drive the owner to bring trespass, to try the title. The Master of the Rolls adopted what had been said by Vice-Chancellor Kindersely in March, 1864, in a similar case (*Loundes v. Bettle*, 21, Weekly Reports, p. 399) where he held that the tendency of modern decisions was to break down the old distinctions between waste and trespass, and that the Court could grant an injunction to a person in possession of an estate, to

restrain another person from committing, under colour of a claim of title, repeated acts of trespass, which tended to the destruction of property. (*Stanford v. Hurlstone*). Under the C.L.P. Act, 1854, an injunction can be obtained in such a case, but only in an action, and in that action the defendant may plead so as to drive the plaintiff to a trial, which may cause a delay of twelve months, or, if points are taken or reserved, perhaps twice twelve months; and, in the meantime, the mischief may be going on, and there is no remedy at law until the litigation is determined, which may be a little too late.

The Vice-Chancellor is a great authority in trademark cases, for his decision in the Glenfield Starch case was affirmed by the House of Lords. His Honor was occupied for two days with a trademark case, which will no doubt be a leading case, as it raised the novel question, whether exclusive use for some years gives a trader the exclusive right to the use of a descriptive epithet not exclusively descriptive of his own article, but merely asserting some quality or kind of excellence which others may have in common with it. The particular epithet in this case was "nourishing", as applied to "stout," not brewed by the plaintiff, nor even brewed exclusively for him, but in some way dealt with by him and sold for some years as *his* nourishing stout. The defendant then got stout brewed, and sold it as *his* nourishing stout, under labels differing in size and form from the plaintiff's, and in no way an imitation of them, beyond the mere use of the word "nourishing." The Vice-Chancellor held that there was no right to the exclusive use of the term except coupled with the *name* of the plaintiff; as there was no use of his name, and no colourable imitation of his mark, there was no right at all to complain of the defendant's use of the term as applied to the stout he sold. (*Ragget v. Findlater*). The decision excited much attention and discussion, but it seems unquestionably sound.

Vice-Chancellor Malins had to decide a case which raised a question, as he said, of very considerable general importance.

A railway company, bound to afford communication by way of level crossing, objected to new building on the land on each side of the crossing as likely largely to increase the traffic ; but the Vice-Chancellor held that they had no right to make the objection, and that it was too narrow a view to say that the enjoyment could not be extended, but that the landowner had the right of using the communication for any purpose to which the land might be lawfully applied and therefore to building purposes. (*Limited Land Company v. the Great Eastern Railway Company.*)

In another case, on an appeal from a County Court, a question was raised which, as the Vice-Chancellor said, "though the sum involved was small, involved principles of great importance," an instance illustrating the extreme absurdity of the limitation of the jurisdiction of the County Courts by mere pecuniary amount, and showing the wisdom of the view taken by the Judicature Commissioners that the nature of the case, and not the mere amount should be considered. The widow and administrator of an innkeeper who had assigned his stock to a creditor, carried on the business on her own account until she became bankrupt, and it was held, affirming the decision of the County Court Judge, that the stock assigned was liable to her creditors, as having been allowed to be in her order and disposition with the creditor's assent. (*Kitchin v. Ibbetson.*)

There was another case belonging to the same general class, but between very different parties, and involving collaterally very different principles. In that case the Prince Louis de Bourbon had given an agreement by deed, pledging his household effects to a member of the Brazilian Embassy, for a large advance of money, which was applied in discharge of the Prince's debts, not including, however, the tradesmen who had furnished the house. The agreement was not registered as a bill of sale, and the Prince afterwards declined to execute one, but offered to deliver up possession of the effects taken ; how-

ever, a person applied to take possession on the part of the Brazilian Minister, but he was refused admission; afterwards, on the same day, the Sheriff entered, and seized under a writ on a judgment obtained on that day at the suit of the tradesmen who furnished the house, and the Sheriff was about to sell under the writ, when a bill was filed, in the name of the Brazilian Minister himself, and not the person who had actually advanced the money, to restrain the Sheriff from selling. The bill stated that the money was the money of the Emperor of Brazil, and that the bill was filed on his behalf. The defendant demurred, on the ground that the Emperor himself should have sued, and that the agreement not having been registered as a bill of sale could not prevail against an execution. The Vice-Chancellor allowed the demurrer on both grounds. (*Baron Penedi v. Johnson.*)

The Vice-Chancellor was called upon to deal with a curious case as to revocation of trusts, which may be compared with another before the Master of the Rolls. A lady, about to enter a convent, settled a large sum in trust for herself, until she entered, and then for herself only for life, with ultimate interests to the family, with a power of revocation if she should at any time leave the convent. She desired to alter the disposition of the money so as to have it absolutely under her own control, and with this view, "acting under the advice of an eminent conveyancer," she left the convent for a week, executed a revocation, appropriating the money absolutely to her own use. She then returned to the convent and demanded the money from the trustees, who, doubting whether the trusts had been duly revoked, paid the money into court under the Trusts Act, and the lady applied for it, on the ground that her revocation carried out her original intention. The Vice-Chancellor held that, though the leaving the convent temporarily for the purpose of the revocation was obviously only colourable, yet that it was so clear the lady had intended to keep the money under her own control, that she was entitled to it absolutely, and

accordingly it was ordered to be paid to her. (*in re Middleton's Trusts*.) In the case before the Master of the Rolls, a gentleman had given a sum in trust for a religious charity, and, by mistake, the name of a different one was inserted in the deed, which was ordered to be cancelled on that ground. (*Hill v. Pease*)

The Vice-Chancellor had another curious case to deal with: an application by a shipowner against a society of underwriters, to prevent their marking his vessel as one of an inferior class. But the Vice-Chancellor refused the application, considering that the Association had the right to make any entry which was a *bona fide* expression of honest opinion. (*Clover v. Ryder*, *Law Journal* notes.)

Vice-Chancellor Bacon, who sat a great part of Term, had several sewage cases before him. One was the case of the Whitworth Board of Health, who, strange to say, were charged with a practice as to sewage injurious to health. The Board were under an injunction restraining them from discharging their sewage in such a manner as to cause a nuisance. The injunction was granted on condition that it should not be put in force for a period. There was an application to obtain an extension of that period for six months. The Vice-Chancellor, however, considered that nothing had been actually done by the Board, and refused to extend the time beyond three months, when they could apply again, and show what steps they should have taken in the meantime. (*Attorney-General v. Whitworth Local Board of Health*.) In the other case an Oyster Company had filed a bill against the Corporation of Newport, for polluting their fishery by the discharge of sewage. The case occupied several days, and the evidence was voluminous; but the Vice-Chancellor did not consider the case made out, and dismissed the Bill. (*Isle of Wight Oyster Fishery Company, v. the Corporation of Newport*.)

In another case, which well illustrates the efficiency of Chancery jurisdiction, the bill was filed in March last for an injunction to restrain the defendants from causing sewage to,

flow into a brook which passes across the land of the plaintiff, unless it is so purified and deodorized as not to be a nuisance. On the 13th of April the injunction was granted, and meanwhile the court allowed the defendants time to complete works which they said would obviate the nuisance. On the 30th of June the time was enlarged until the 13th of November, and then there was an application to enlarge the time until November next year. The Vice-Chancellor, being of opinion that the evidence adduced in support of the application showed that the defendants had exerted themselves to do the necessary work, granted an extension of time for four months, they undertaking to complete the works and to cleanse the brook. (*Broughton v. the Crewe Local Board.*)

The Vice-Chancellor was called upon to exercise the common, but important head of equitable jurisdiction, under which the negotiation of Bills, of which the consideration has failed, is restrained, and their re-delivery is ordered. One mercantile firm had remitted acceptances to another to be covered by bills of lading, which had not been sent. The Vice-Chancellor granted an acquisition to restrain the negotiation of the bill until the hearing. (*Sternkopf v. Kruger.*)

In one case the question was as to the effect of an arbitration clause in a policy of insurance effected in a mutual insurance Society. The clause was that the decision of the committee should be binding upon the members unless the party claiming required an arbitration, and then, that if any difference should arise between the committee and a member, the matter should be referred to arbitration, and that the obtaining an award should be a condition precedent to the right of a member to maintain an action or suit. The clause, it will be seen, was carefully drawn to meet the decision of the Lords in the case of *Scott v. Avery*, given upon what Lord Campbell justly called the "preposterous doctrine" derived from feudal times that an agreement to refer future differences to arbitration was invalid, and contrary to the policy of the law, which, if ever

law, had certainly become obsolete when the Legislature, in the 3 and 4 Will. IV c. 42, expressly provided that agreements for reference to arbitration should be rendered irrevocable by being made rules of Court; an enactment which the Court of Queen's Bench held to apply to agreements for reference of future differences as well as present, which of course involved that the old doctrine was obsolete. This view was taken by Lord St. Leonard while Chancellor in Ireland, but strange to say, the judges in *Scott v. Avery* were unaware of either of these decisions, and so upheld the ancient doctrine; distinguishing, however, conditions precedent, a distinction as absurd as the doctrine. However, the distinction was established and the clause in the present case was framed upon it. When the loss occurred the plaintiff gave to the secretary of the society formal notice demanding payment of the money. The committee of the society considered the claim, but decided that the plaintiff had no claim, and thereupon the plaintiff filed his bill. The Vice-Chancellor was of opinion that the arbitration clause was perfectly clear, and that this was just such a case as the rules intended to provide for. He considered that the plea was good, and that it must be allowed. (*Rumbold v. Cowie.*)

In a case before Vice-Chancellor Bacon a question arose which, as he observed, is of great mercantile importance. A bill of exchange was remitted in the usual way by the Bank of New Orleans to the London bank, with what were supposed to be bills of lading to cover it, but which, in fact, were forged. The London Bank sent the bill to the drawer for acceptance with the usual note that they held bills of lading to cover it. He accepted, but, on finding the forgery, refused to pay. The New Orleans Bank sued him on the bill, and he applied to Equity for relief, but the Vice-Chancellor held that there was no ground of Equity, as there was no representation as to the validity of the bill of lading (*Baxter v. Chapman.*) Thus, it will be seen, "equity follows law," and legal right is never disturbed in Equity, on account

of hardship without some definite ground of equitable relief. So in a case of ejectment for non-repair and non-payment of rent, the same principle was upheld, and as the tenant could show no definite ground for relief, that as he could not show that he had substantially kept his covenants to repair and insure, the bill was answered. (*Radcliffe v. Sewers*, Vice-Chancellor Hall.) A question arose as to whether bankers had a lien on a box of securities deposited with them, not as security, but for safe custody, and the Vice-Chancellor held that they had no lien. (*Leese Martin*, Vice-Chancellor Hall, *Law Journal Notes*, 187). This was in accordance with the great case of *Brandao v. Barnett*, the leading case on the subject, which went to the Lords twenty years ago. (8, M. & G.)

A case occurred before Vice-Chancellor Bacon which illustrated in a striking light the superior efficiency of Equitable Chancery procedure. The case is so illustrative that we extract the excellent note of it in the *Law Journal Notes of Cases* :—

“The bill in this suit was filed to obtain a declaration that two policies of insurance were obtained by the defendant from the plaintiffs by misrepresentation and concealment, and that they might be set aside and cancelled; and also to restrain actions at law. The defendants, however, now no longer resisted a decree to this effect, and the only question remaining undisposed of was one of costs. In 1862, the defendants effected with the plaintiffs two policies of insurance on a large shipment of goods in the ship called the *Peterhoff*. The defendants gave the plaintiffs to understand that the vessel was proceeding to a neutral port with a legitimate cargo, and consequently obtained the insurance at the simple peace premiums. The *Peterhoff*, with the goods on board, was captured by a Federal cruiser, and the goods were condemned and sold in a Prize Court as contraband of war. The defendants then, in 1865, commenced actions on each of the two policies. These actions were resisted by the plaintiffs on the ground of fraudulent concealment and misrepresentation; but the defendants still denied that the goods were contraband, or that they had any dealings with the Confederate Government. In 1866 the Court of Common Pleas directed that one action should be tried first; but, if one action went against them, the assured retained the liberty of proceeding with the other. As the first action

lasted for years, and the second action was still hanging over them, the plaintiffs in 1866 filed this bill; and they did so in order to get both policies cancelled, and also to preserve for their use on the second action, if it should ever be brought, the evidence adduced on the first trial. The action at law came on for trial nominally in 1866; but it was referred to an arbitrator to prepare a special case, and the decision was not given till August, 1871, when it was given in favour of the present plaintiffs. Even then the defendants refused to accept this decision as regarded the second policy, and the plaintiffs were therefore compelled to proceed with this suit. The question to be decided was, whether, under these circumstances, the costs of the suits should be borne by the defendants, who contended that the action having been brought in a Court of Law, that was the proper and more convenient form in which to try this case, and that they ought not to be compelled to pay the heavy expenses of the Chancery suit. They also argued that this was a mere bill for discovery, and that therefore no costs ought to be given. But Vice-Chancellor Bacon said the Company say in plain terms, that they have been cheated, and shall ask for a decree that the policies be cancelled. This is a plain equity, and ought not to be mixed up with the questions at law. The plaintiffs were liable to have an action at law brought against them, and they were driven to proceed with this suit; the correspondence shows they would willingly have given it up if they could. There must certainly be a declaration that the policies shall be cancelled, (*London and Provincial Marine Company v. Seymour*).

Vice-Chancellor Hall, like the other Equity Judges, had some sewage cases, and made an order restraining the Mayor and Corporation of Barnsley from polluting a river, by throwing into it the sewage of their town. (*Attorney General v. The Corporation of Barnsley*, Dec).

Vice-Chancellor Bacon had a case to deal with which raised the question whether a co-trustee, who had acted with good faith, or the *bona fide* purchaser of property should suffer from a loss occasioned by the fraud of a trustee who had removed and absconded with the purchase money. The Vice-Chancellor held the co-trustee and the purchasers liable to restore the land to the owner (*Heath v. Crealock*), and his judgment was a very valuable commentary on the maxim of equity that the court will not assist a claim against a *bona*

vide purchaser for value, without notice. Here, said the Vice-Chancellor, the maxim stops, nor is there any other difference between the rules of Equity and Common law on such cases. This is a case which well deserves to be studied by those who have cloudy notions as to some necessary difference or even antagonism between Law and Equity.

COURTS OF COMMON LAW.—The judges of these courts are not, like those of Chancery, judges of one court though sitting separately, but constitute different and distinct courts, originally, no doubt, with different kinds of jurisdiction, Crown, Revenue, and Common, the two former still subsisting in the Queen's Bench and Exchequer, but reduced to such a narrow compass that the business peculiar to those two courts barely occupies more than two or three days. Under the Justices Summary Jurisdiction Act the appeals go to all three courts, and so as to County Court cases of prohibition.

In the Queen's Bench the proper Crown business was very small, and did not occupy the Court more than a few days. The court sat in two divisions, under Lord Hatherley's Act, on account of the Tichborne case, which being a trial at bar, is tried *in banco*. There was a motion in the other division to extend the time for the trial of the case, and before the judges who are trying the case a question was raised as to the effect of an adjournment, which had been allowed to the prosecution for the purpose of procuring evidence in reply. But as the question would be raised on the record, by writ of error, the court would not disavow their own order, and, moreover, they intimated that it had been made on peculiar grounds, as unprecedented as the order itself; the counsel for the defence had misled the prosecution by a misstatement, the effect of which was that they had brought the wrong witnesses from beyond seas, and had been prevented from bringing the right witnesses, and there can be no doubt that this would amply justify the order made. There were motions in three highway indictment cases, in one of which a question arose as to the effect of discharge of

a jury on some of the counts. (*Queen v. Oastler*). In another case, a fine of £50 was inflicted (*Queen v. Masters*). In a third case the question arose as to the effect of an order under an Enclosure Act to stop up a highway. (*Queen v. Alnwick*). Most of the Crown cases were rating cases, which, of course, are really civil cases. In the case of St. Thomas' Hospital the court reached the *reductio ad absurdum*, which was the necessary result of the decision of the Lords in the Mersey Dock Company case, and held a hospital rateable to the poor! (*St. Thomas' Hospital case*). In a case, under the Local Government Act, the court held that the certificate of the surveyor was conclusive only as to the amount payable by the owner for paving of a street, not as to its being repairable by the parish. (*Hesketh v. Local Board of Atherton*). In a School Board case they held that overseers cannot, as an objection to the rate, raise the question as to the excess of school accommodation provided, which can only be raised on the audit. (*Shelly School Board v. Overseers of Shelly*). Such were the Crown cases, in the course of Term, in the Court of Queen's Bench. In all the courts the cases on appeal from justices summary jurisdiction occupied two or three days. The rest of the business was civil.

So in the Court of Exchequer, two or three days sufficed for its proper or peculiar business, that of the revenue, for it may be observed that nothing can be more anomalous and absurd than the diversity of jurisdiction, provided for determining questions of revenue. In some species of taxes questions are decided on appeal to two judges sitting secretly and deciding without argument! The proper tribunal for all such questions is this ancient court, originally erected only for the decision of questions of revenue. The present will be the last year in which the First Lord of the Treasury, representing the Lord Treasurer, (an officer never appointed since the time of Harley), and his assistant, the Chancellor of the Exchequer, will be members of the court. Mr. Gladstone holding both offices, sat here for the last time in that capa-

city, on the morrow of St. Martin, when the sheriff was nominated. The Lord Chief Baron and Barons Bramwell, Pigott, and Pollock, sat to hear revenue cases, and one case illustrated the necessary connection between law and equity in revenue cases, for it was a claim to probate duty, on a devise of land, on the ground of the equitable doctrine of "conversion," as it had been devised to be sold, and though the trust had failed, the court held that the property was indelibly impressed with the character of personalty, by virtue of a legal fiction, adopted by Courts of Equity only in furtherance of trusts. (*Attorney-General v. Leman*).

As already stated, in all the courts of Common Law, the business is almost entirely civil, composed of such private suits as have a common jurisdiction. The exercise of this jurisdiction, unlike that of courts of Equity, is rarely final. On a hearing in Equity there is a final decree, subject only to appeal. It is otherwise at law, for first there is the trial, which is hardly ever final, and in most cases tends to motions to review the verdict, or on reservations of a point of law, and there is first the rule *nisi*, and then the hearing, and then there is often a second if not a third trial, possibly with the same result, so that a case in a court of law seems always going on and never at an end, and comes again and again before the court, although the issue is generally short and simple, and turns usually on a question of fact. Hence it is that in a very small proportion of cases which come before a court of law is there any final decision of a legal question, for in all motions after trials, unless the point is not arguable, there is only a rule *nisi* on an *ex parte* application, and it is only on special case, or reservations of a point, that the decision is final, and only on a special case is it so on the first hearing. The first four days of Term, in each court, are occupied with motions for new trials, generally on questions of fact, almost always either on the questions of fact, or the application of the known law to the particular facts. Thus, last Term, for the first few days, in each court, there were only motions, and for the most part for new trials, and

chiefly on evidence, or the practical application of law to the facts of particular cases, and the greater part of Term was occupied, as usual, with the discussion of similar questions. The Court of Queen's Bench, for several days, was occupied with motions for new trials, in which Mr. Justice Blackburn, Mr. Justice Quain, and Mr. Justice Archibald sat *in Banco*, motions for new trials occupied most of the four first days; many of them on the ground that the verdicts were against evidence, or for excess of damages. It was observed, however, that as regards motions on the latter ground the court was less ready than courts have been to grant rules. Thus when an application was made for a rule *nisi* to reduce the damages in a case in which a jury had given £1,575 against the Lancashire and Yorkshire Railway Company on a claim for compensation, the court held that juries were the proper judges in the first instance in cases of this kind. Mr. Justice Blackburn remarked that although he should not have given so large a sum, yet, when he considered the whole of the circumstances, he could not say that the jury had so obviously transgressed the bounds of prudence as to require correction. And the rule was refused. So in a case of breach of promise of marriage the Northern Circuit in which jury had given large damages (£1,700) the court refused to grant a rule to reduce the damages, observing that it was for the jury to estimate the damages. This is sound sense and good law, and nothing can be more contrary to law and good sense than judges spending their time in reviewing assessments of damages given by juries, or the verdicts of juries, upon facts. Yet a large portion of their time, in this as in other Terms, was so occupied, and paradoxical as it may appear, for the most part in cases of fact, chiefly personal torts, accident cases, and the like, turning entirely on questions of fact peculiarly for the jury.

As usual, in the Courts of Common Law, a large portion of the Term was occupied with applications for new trials, or to alter verdicts, and the greater portion of the Term was taken

up, either in discussing questions of fact, or in indeterminate discussions on mixed questions of law and fact. Comparatively few cases were heard and determined on demurrer, or "special" case, or on points reserved, and even as to these the decision was often not final, for the case was usually reserved with power to the court to draw inferences of fact, that is, in effect, to determine the question of fact. Thus, in one case, the question was whether a ship which had been injured through grounding upon an anchor in harbour had been injured through the negligence of the Harbour Board. The case stated that there was negligence in not fixing a buoy to the anchor, but left it to the court to say whether there was negligence in not taking care to keep the anchor down, and whether the accident arose from that cause or from want of a buoy, both pure questions of fact. And it was contended on the part of the board that the accident had not occurred through the want of a buoy, the only negligence stated in the case. Thus, one court was occupied a day and a half in considering whether a ship had been injured through one or other of two causes! (*Foliffe v. The Wallesley Local Board*).

So, in another case, where a railway passenger had been injured in getting out of a train drawn up beyond the platform, when the vexed question was raised whether the stopping and calling out the name of a station is not an invitation to alight, a question which some judges hold to be one of fact, others one of law: of these latter, some take one view of the question, and some the opposite view. It happened that the judge who tried the case belonged to the latter class, and took the view adverse to the passenger, and so he directed a non suit, and reserved the question, and the Court of Common Pleas granted a rule *Nisi* to have the question argued, though it is one eminently fitted for a jury. (*Weller v. The London and Brighton Railway Company*).

It is to be observed that where the judge who tried the case agrees in the verdict of the jury, it is hardly ever disturbed, and thus in a case moved this Term in the Common

Pleas, where the plaintiff had been knocked down by a train as he was crossing the line at a level crossing, there was a dispute as to negligence on his part, but as he had recovered a verdict, and the judge who tried the case approved of it, the court refused to grant a rule to disturb it. (*Vyse v. The Great Western Railway Company*).

In an action against railway carriers for the loss of jewellery, for what they would not, under the Carriers' Act be liable, unless the loss was owing to felony by their servants some evidence was given at the trial with a view to show that this had been the case, and so the jury found, but the court granted a rule to set aside the verdict, on the ground that in their opinion, there was "no evidence"—i. e., no sufficient evidence (for so the phrase is now understood) of felony by the company's servants. (*Vaughan v. London and North Western Railway Company*). One can scarcely conceive of a question more peculiarly fitted for a jury; but, as it is, some day next Term the court will have to consider whether it was more probable that the jewellery was stolen by the railway servants or by any one else, and to consider this upon mere written notes of the evidence! And, if they do not happen to concur with the jury in their judgment of the evidence, they will set aside the verdict, and send the parties to a new trial. And a year or so hence there may be a similar motion after another trial, and so on until the poor plaintiff is ruined. And yet, on all occasions, the judges and the counsel will be ready to extol the superiority of trial by jury, more especially for the trial of such classes of cases. The anomaly will appear all the greater when it is borne in mind that if the railway servants had been indicted for the felony, the verdict of guilty could not have been set aside.

Again, the same anomaly is exhibited in actions for injuries by negligence. A poor factory girl had been fearfully injured by being caught in the gearing of the loom at which she worked, and which, in defiance of the Factory Act, was not properly fenced. The jury, which included, it happened

two mill-owners, expressly found, in answer to the judge, that she had not helped to bring about the accident by her own negligence, with a knowledge of the risk she was incurring, and they found in her favour, with very moderate damages. Nevertheless the judge directed a verdict to be entered against her, apparently on that possible doctrine of law, as absurd as it is inhuman, into which our judges have been betrayed by false theories, that the person entering into employment must be presumed to have entered into an implied contract to bear all its risks, and among these the risk of being maimed or mangled by the gross negligence of others! The court granted a rule to question the application of this dreadful doctrine to the particular case, but it is to be feared that it is too firmly established to be destroyed, and it is astonishing it does not occur to the judges that it ought surely to be confined to accidents inevitable in their nature, and ought not to extend to injuries caused by negligence or misfeasance.

The judges assume the functions of juries not only in cases tried in the superior courts with juries, but even in cases coming from the County Courts. Thus even in the smallest cases, the suitors suffer all the delay, and expense, and uncertainty of double trial of the facts. Thus in a case of injury to a railway passenger in getting out of a carriage, the question being whose fault it was, one peculiarly for a jury, when the County Court judge has, whether at the assent of the parties, or by way of a nonsuit, decided it, still the Superior Court allowed an appeal, on the subtle pretence that the question is whether there was any evidence, though, of course, that itself depends entirely on the effect of the facts, a pure question of fact, (*Lewis v. The London and Dover Railway Company*, Queen's Bench). So where a question arose on a ticket limiting the liability of a railway company as common carriers of goods, the question was whether there had been wilful misconduct, peculiarly a question for the jury, and which the County Court judge had most properly left to the jury, the evidence being that the railway servants

had unloaded in breach of their duty at the wrong place, just to save themselves trouble, and that this led to the injury, and the jury having most properly found for the plaintiff, the court reversed the verdict (Blackburn, Quain, and Archibald) on the ground that wilful misconduct meant not only a wilful act of misconduct, done with the knowledge that it would cause the damage to the goods. (*Glenister v. The Great Western Railway Company*, Queen's Bench.) Surely the County Court judge and jury took the sounder view.

Much of the business of the courts consisted of cases of this kind. Thus, during last Term, in the Court of Exchequer, several cases were reported in one day of rules for new trials in accident cases. One was a case in which a child got on a railway and was passing at a crossing, where there was no gate, and was knocked down and had its foot cut off; another was a case in which an omnibus ran against a gig, and the third was a case in which a passenger, getting out of a train at a station, was thrown down and injured, in consequence of the train moving on. All these were cases peculiarly fitted for juries, on account of the conflict of testimony, and the jurors being far better fitted than lawyers to form a judgment as to negligence. Another class of cases in which much time was taken up in motions for new trials, are trumpery cases of breach of promise of marriage or seduction, of which several were moved last Term. Thus, there was a case tried before Baron Cleasby, in which the verdict was only for £25, and yet there was an application for a new trial, and a rule *Nisi* on the question of corroborative evidence. So, in a seduction case, tried before the same learned Baron, verdict £40, there was an application for a new trial on the ground that there was not sufficient evidence that the girl was in the "service" of her parents at the time, a question peculiarly for the jury.

Most of the cases in which rules were granted were only following out the application of known rules of law; as, for instance, the rule as to the law of carriers that the party signing a ticket is bound by its terms. Thus in a case in

the Exchequer, where the drover who took some cattle to the railway station, was told by a porter to put his mark to a paper, which he did, and he said that he knew he "was signing for the cattle," but he knew no more about it, not having read what he signed;—the judge held that the plaintiff, the owner of the cattle, was bound by the terms of the ticket; and directed a non-suit. The Court granted a rule *nisi* to set the nonsuit aside, on the ground that there was no evidence that the drover had signed any contract at all, or, at all events, none that was binding on the plaintiff. (*Phepps v. the Great Western Railway Company.*) If the rule is made absolute, there must be a new trial; and the two trials will probably cost double the value of the cows, and will have taken up a year and a half, and yet the facts do not appear to have been in dispute, and the case could have been placed on half a sheet of note paper and decided in an hour by any competent lawyer.

But it is only in a few cases in the Court of Common Law that points of law are determined, either in refusing rules, or in decision after argument. Rules for new trials for misdirection as on points of law are rarely refused, and never if the point is really arguable; therefore after a rule *nisi* is refused, it may be assumed that the point is clear, and though it may be made, is utterly untenable. Thus in the Common Pleas, last Term, the point was raised whether, an answer to an advertisement for tenders containing an offer to supply goods at a price, and its acceptance, followed by an order, constituted a contract. The plaintiffs issued such an advertisement; the defendant answered it by an offer, the plaintiff accepted the offer, and ordered a supply on the terms tendered; but the defendant failed to carry it out, and his defence was, that the contract was unilateral; there being no obligation on the plaintiffs, who had accepted the tender, to order any goods under it. The court took time to consider it, and then rejected the objection and refused a rule. Such tenders, they said, are of daily occurrence, and on an order being sent by the plaintiffs in pursuance of the

acceptance, a contract arose. The court abstained from deciding whether before an order the tender or offer could have been withdrawn, probably it could, as a contract was not created until an actual order on the terms offered and accepted. (*The Great Northern Company Witham.*)

In another case a novel question was raised. It was an action arising out of an agreement between the subscribers to charities to exchange their votes. The plaintiff agreed to give the defendant his votes at an election in consideration of an equal number of votes to be put at his disposal on another occasion. In consequence of the non-performance of this bargain he had subscribed to the charity a sufficient sum to obtain the required number of votes, and for recovery of this sum he sued. The question was reserved whether the agreement was valid, and the court seemed to entertain great doubts about it, because, as the judges observed, surely it was the duty of the subscribers to give their votes with reference to the real merits or necessities of the candidates, which, however, it was urged was practically impossible. The court granted a rule *nisi*, only they said that the case might be discussed, as it was late in the Term when they reserved their judgment (*Bolton v. Madden.*)

Another case raised illustrated the law of contract. The action was by a shipowner against charterers for delay in loading. The charter, as usual, allowed a certain number of "work days" for loading, but in consequence of the roughness of the weather, it was impossible to load within that number, and the charterer applied to the captain for an extension of the time, and he, on behalf of the owners, agreed to allow it, and within that time the vessel was loaded. Nevertheless, the shipowners sued for damages for the detention during the additional time, and recovered £450. The question was reserved, however, whether "working days," did not mean days, on which it was possible to work, and whether the second agreement was valid. These points counsel for the charterer moved, as well as on the ground that the verdict was against evidence; but he moved in vain,

for the court (Blackburn, Quain, and Archibald) held that "working days" meant, all days except Sundays, and that the alleged agreement was after breach and without consideration, and so no accord and satisfaction; though query whether the parties were not the best judges of that, and whether the amicable settlement of the matter on the spot was not a mutual benefit. (*Holman v. Cape Copper Company.*)

(To be continued.)

III.—THE QUALIFICATIONS OF SPECIAL AND COMMON JURORS.

By T. W. ERLE, Associate, Common Pleas.

THE four principal alterations in the standards of qualifications of Special and Common Jurors which were contemplated by the Juries Bill of last Session were as follows:—

- (1.) The raising of the standard of qualification of common jurors.
- (2.) The extension of the qualification both of common and special jurors, so as to comprise such lodgers and other persons as are fully qualified by their social standing for serving on juries, and who occupy residences on a more or less permanent tenure, but who at present escape service in consequence of their tenancies not being of such a character as to fall within the operation of the existing jury law.
- (3.) The final abandonment of the formula "banker, merchant, or esquire," as the designation of a special juror, and
- (4.) The addition to the list of special jurors in the city of London of one representative of each public company carrying on its business within the city.

Speaking in general terms of these proposals, they may be described as having been respectively based on the following considerations :—

The raising of the qualification of common jurors is in accordance with the recommendation of the Judicature Commissioners. The alteration seems to be desirable for the purpose of relieving from service the lower class of journey-men and other persons of very humble means, to whom it is a serious loss, which they can but ill bear, to be withdrawn from their ordinary occupations, and kept in attendance for, perhaps, several days at a time, at some Court. In consequence of the decline in the value of money which has taken place in the course of the last forty or fifty years, the standard of qualification of common jurors under the existing law, which was passed in 1825, now reaches a lower class than was contemplated by that law. It would be necessary to raise the qualification still more than is now proposed if it were desired to make it proportionate to any of the various standards which were adopted at different periods in former times. But that it should be so fixed as to represent even the lowest of those standards is not practicable now, since the conscription for service in the jury box, which has of late years become very heavy, would then fall on too limited a section of the community.

The new qualification designed to include lodgers, is analogous to that which confers the lodger franchise. Its purpose is to reach those who rent furnished houses, and those who reside in lodgings for some substantial term, and not for any merely temporary object or transitory occupancy. The occupiers of furnished houses and of lodgings are now exempt from service on juries, as not being rated.

There is also a very large and increasing number of persons who live in residences, of which the flats in Victoria Street may be taken as a type, who ought to be, and would be, brought by the provisions of the Juries Bill upon the jury list. The flats, in every case, belong to a company, and the tenants, although their occupancies are, for all practical pur-

poses, of separate and independent private houses, now, as not being rated, elude the levy for the jury-box.

The principles advanced by the Juries Bill, as those on which the standards of qualification of common jurors should be founded, met with general acquiescence. Great pains were taken by the Select Committee of the House of Commons in considering and fixing the figures throughout the several sections of the Bill in which these principles were embodied, and the standards thus established may, subject to two observations to be made presently, be confidently adopted as the best that can be devised. The conditions on which the qualification of special jurors should be based excited some controversy.

It was proposed that the standard of qualification for special jurors should be based upon rating or rental, only, to the exclusion of the designation of "banker, merchant, or esquire," which now, concurrently, or alternatively, with rating, gives a man a title to be put upon the Special Jurors' List. The grounds for this proposal were as follows: According to the law as it stood until the year 1870, such men, and such men only, as came within the category of "banker, merchant, or esquire," were to be classed as special jurors. It has been suggested by a high authority that the intention of the Legislature in its choice of the particular terms which were employed to define the status of a man fit to be a special juror was probably as follows:—Bankers were selected as being well versed in questions relating to money. Merchants were those whose calling rendered them familiar with mercantile customs and transactions, and esquires were gentlemen who were likely to be conversant with rural affairs. It was found, however, by experience, that this rule of qualification, when taken as exclusively defining the class of special jurors, was objectionable on several grounds. In the first place, if the terms in question had been construed according to their strict and proper sense, the list of special jurors which they would have supplied would have been quite insufficient for the requirements of the Courts. For the

whole number of bankers, even if every banker had been available for service, would have gone but a very little way towards meeting the consumption of special jurors by even one alone of the Superior Courts of Common Law. "Merchant" could not, without doing violence to its plain meaning, have been held to include underwriters, insurance or colonial brokers, stockbrokers, stockjobbers, accountants, shipowners, warehousemen, and very many others, who would have been most valuable as special jurors. The term clearly and mischievously shut out a large proportion of the men best calculated to do good service as special jurors, and yet was hopelessly vague as a definition. For whom does it include? Formerly it was considered that a merchant was a trader who imported or exported, and sold by wholesale, only, using samples, and not the actual goods to be taken or supplied, in the negotiation of his bargains, but this course of business is now, in innumerable instances, combined with more or less retail dealing. It would be found much more difficult than anyone who has not made the attempt would be likely to suppose, to draw a line accurately defining what traders now-a-days come under the denomination of merchants, and the result of fixing any such boundary, even conceiving that this could be successfully accomplished, would inevitably be to curtail the legal limits of the class to an extent which would render it almost entirely unproductive as a source of supply of special jurors. It appeared by the evidence which was given before the Select Committee of the House of Commons of which Lord Enfield was the chairman, that a very liberal construction indeed was put upon the term, for that, in a multitude of cases, it was taken by the framers of the jury books to cover rag, bone, and potato merchants, as well as the rather more debatable cases of wine, coal, and timber merchants, and it was shown, in fact, that the effect of the employment of a word possessing a meaning of indefinite elasticity was simply to enable the compilers of any special jurors' list to indulge their own taste, favour, or caprice, without any control or limitation whatever.

The designation of "Esquire," if it had been interpreted as applying to such persons only as were legally entitled to use it, would have reaped but a miserably lean crop of names for the special jurors' list. The members of some professions, as, for example, barristers, and officers in the army, are legally Esquires, but it will be found that most of the callings which confer this title on their members, are such as necessarily come within the list of exemptions from service on juries. Excluding, then, the members of professions who, as such members, are legally Esquires, and taking the rest of the community at large, if men are to be allowed to appraise their own social position for themselves, and their estimate is to be accepted as if it were authoritatively established, the result will not be satisfactory, since it is usually the case that the degree of tenacity with which a man asserts his title to be ranked and addressed as Esquire, is in inverse proportion to the strength of any rightful claim which he may possess to be so designated. The general result of the imperfect definition of the special juror class was that the list was made out on principles which may have been intelligible, perhaps, to the persons by whom it was compiled, but which were wholly inscrutable to the outside public. To give one example of this out of the number which used to be of daily occurrence. It was a source of wonder to me whether a certain pastry cook, a member of the Common Council, who used to serve on special juries in the Court of Common Pleas when sitting at Guildhall, came there in the nominal character of "Banker," or in that of "Merchant," or of "Esquire," the first of these definitions appearing to be scarcely less totally inapplicable to him than the two others. In consequence of the strong evidence given before Lord Enfield's Committee, and in conformity with a recommendation made by that Committee, and by the Judicature Commissioners also, an Act was passed in 1870 by which a rating qualification was added to that of "Banker, Merchant, or Esquire." Since that date, therefore, the special jurors' list has been made out on a plan

which, if not completely, in universal opinion, satisfactory, by reason of its introducing, as was foreseen it would do, in company with the abundant harvest of new and unexceptionable special jurors which it gathers in, a certain additional number of retail shopkeepers, licensed victuallers, and others, following avocations of a deeply plebeian order, is at least intelligible, and has brought upon the muster roll of special jurors a strong contingent formed of some of the most valuable material which their ranks contain.

The proper qualification of special jurors for the City of London is one of the first, and most serious questions which must necessarily engage the consideration of the framer of any measure intended to affect the law relating to juries, and on the preparation of the Bill of last Session, the attention of the then Attorney-General was carefully directed to the matter. The point is one of some difficulty, since no criterion of the possession of intelligence and good judgment can be fixed by Act of Parliament, nor can a peculiar degree of knowledge of commercial matters, such as is supposed to be wanted to give a Guildhall special juror a proper aptitude for his duty be ascribed as a certainty to any man, except as a consequence of his following some avocation which compels the acquisition of such knowledge. But it will be found by experiment that it is, in practice, quite impossible to particularise specific callings as necessarily rendering those who pursue them desirable as special jurors in the City. To take one case only, out of a great number, as an example. Men who are described simply as "agents," take, as is well-known, a very important part indeed in mercantile transactions. But the profession of men styling themselves agents, extends from the members of a most respectable and wealthy class down to persons living from hand to mouth on their wits, and ready, like a Græoulus esuriens, to do anything in the world for a shilling.

In default, then, of any available test which could be founded on a man's profession of his fitness to be a special juror, and the old formula of "Banker, Merchant, or Esquire,"

having proved to be little better than useless, it was thought necessary, in framing the Juries Bill, to propose, as has been already stated, that the qualification of special jurors should be constituted by rating or rental only. It is not, of course, for a moment denied that rating or rental supplies but a very imperfect indication of a man's capacity for serving as an effective special juror. Still, these tests, rough as they may afford *some* evidence, however inconclusive, of vigorous and successful habits of business, or at any rate of the prosecution of some substantial calling, or of the possession of some such means and position in life as are generally found to be accompanied by a certain degree of education, and they may, therefore, be at least preferred to the caprice, or opinion, or, as will certainly be suspected, the favour dependent on occult considerations, of the framers (in many cases very ignorant people) of the jury lists, which are probably the very worst "fancy" qualifications which could possibly be invented. It may very reasonably be doubted whether there is any sufficient foundation for the common assumption that causes involving questions relating to peculiar interests, as, for example, shipping cases, cannot be satisfactorily tried except by special juries composed of men who are practically familiar with such matters. Probably, a mixed assembly containing men of business of various occupations, and thus free, as a body, from the bias or contracted opinion which may, unsuspectedly, sway the members of any particular trade or clique, is the best tribunal for the trial of any issue of fact, whether the dispute be on a mercantile or any other transaction.

The Act of 1870, besides enlarging the standard of qualification of special jurors, introduced also two material alterations in the mode of summoning. It is necessary to speak of these, since they have acquired some relation to the subject of the qualification of special jurors.

The first of these was the abolition, as far as all ordinary practice is concerned, of the system of summoning a separate special jury for the trial of each particular cause ;

a system which had been fully shown to involve, without any adequate degree of compensating advantage, the vices of unnecessary inconvenience and expence in all their most aggravated forms. It substituted a general panel of jurors to serve for a certain limited period, and available to try all the causes which may happen to come on for hearing during that period.

The second of the main alterations introduced by the act in question in the mode of summoning juries was in fact a declaratory statement of the existing law and an injunction that it should be better observed, rather than the initiation of any new practice. For it required Sheriffs and their representatives to do what was, and always had been, their duty by summoning special as well as common jurors for service on common juries.

It has been alleged that the quality of special juries, especially in the city of London, has latterly deteriorated. Now since it is plain that this fact, if such it be, cannot possibly be attributable to the system of promiscuous summoning just referred to, which has affected common juries only, a supposition has been sometimes expressed that it must necessarily be due either to the enlargement of the standard of qualification, or to the new method, just now described, of summoning special juries; that is to say, by general panels instead of by a separate panel for each particular case. But the truth will be found to be that the system of summoning which is pursued in the City of London, and which, in its principle, is also followed to a greater or less extent in many of the English counties, precludes the forming of any dependable conclusion as to the quality of the special jurors' list taken as a whole. This will be understood on a statement of what that system is. To describe it in the shape in which it is found in the City. The Secondary, with whom the duty of summoning jurors rests, does not at any time, when called upon to discharge this function, resort to any general list of jurors supplied from the whole area of the City, but lays the 28 wards into

which the City is divided successively under contribution. His plan, as it has been given in evidence, is to "work," to use a common expression, two wards at a time, taking half the special, and half the common jurors who may be wanted at the moment, from each of these wards; and after exhausting the lists of these two districts, to treat two other wards, the next in geographical sequence, in the same manner. In actual practice, this scheme of summoning would not seem to be always quite strictly adhered to, since the result which is witnessed is that of jurors brought from even a still narrower field than would be covered by the arrangement just described. For it will be seen on inspecting the lists of special jurors supplied to any of the Superior Courts for its sittings at Guildhall, that in many instances the whole, or nearly the whole, of the men whose names appear on any particular panel are drawn from some single, and frequently very small, locality. Last year one of the panels which was furnished to the Court of Common Pleas, was almost equivalent to a column of the Directory under either of the headings "Woolbrokers," or "East India Avenue." The jurors' list is made out by streets, and not according to the alphabetical order of the names, so that in the natural course of things a summoning officer, when dispatched on a professional excursion, has to net his prey by proceeding along some series of contiguous houses.* This system of summoning has prevailed for a great many years past, and was handed down to, and not introduced by, the present Secondary. It is unquestionably a bad one, combining as it is so well calculated to do, the maximum of public inconvenience with the minimum of expediency as regards the jury box. Each trade or business, as is well known, is concentrated in some particular locality in the City.

* "Are the names arranged alphabetically in the Ward lists?" "No, it is according to Streets."

"Then you would summon a whole street at once?" "Yes, that has been the rule." Evidence taken before the Select Committee on the Juries Bill. 21st June, 1872.

The district which takes in a part of the Bank and of the Royal Exchange, in the Broad Street Ward, is largely occupied by stockbrokers, and dealers in stocks and shares of all descriptions. The headquarters of corn merchants are in Mark Lane, and those of sugar brokers in Mincing Lane, both of which streets, or the greater part of each, are in Tower Ward. Tower Street, with its wine merchants, is in the same ward. Fruit merchants are thickly settled in the adjoining ward, that of Billingsgate. Each leading business, in short, which is followed in the City, has, generally speaking, its own local habitation, or, at any rate, a local nucleus which is its centre of vitality. The area of each ward being, roughly speaking, not more than about one twenty-eighth of a square mile, the effect of its being fastened upon for jurors is partially to depopulate it for the time being, and the trades carried on within it are, on such occasions, more or less paralysed, the bulk of those who conduct them being carried into captivity at Guildhall. The juries also, which are thus collected, are not so completely efficient for the purposes of justice as they would be if composed of men familiar, taking them all together, with a greater variety of occupations, and thus less liable, as a body, to be affected by any of the narrowing influences or feelings which are sometimes found to prevail in particular circumscribed localities, or among the members of limited communities. In view also of the well known natural tendency which leads some men who, although of sound intelligence, are of so diffident or pliant a disposition as to surrender their whole independence of understanding to an inveterate habit of submitting their own opinion to the control of such of their neighbours as may happen to possess a more robust decisiveness of judgment or a spirit of more active self-assertion, it is better that the members of any given jury should come from several different districts rather than from one only, since in the latter case they would be likely to be all more or less personally known to one another, and some of them might exercise an undue ascendancy over the rest.

It is obvious that the quality of juries must, under the system which has been described, vary extremely according to the spots from which they may happen to have been taken. The Aldgate, Langbourne, and Tower Wards probably supply the best jurors, and those of Farringdon Without and Cripplegate Without, which are largely occupied by retail tradesmen, the worst. A short time ago, in the result of the arrangements which are pursued at the Secondary's Office, the common jury panel of 48 jurors, which served throughout the after-term sittings in the Court of Common Pleas at Guildhall was exclusively composed of men qualified as special jurors, and several of the most considerable names in the City were noticeable on it. The special jury panel, which was provided for the same Court for the same period, was of a very inferior quality to that of the common jury. A reasonable complaint was made of the composition of the special jury panel, but could the two panels have been interchanged, no ground for adverse observation could have arisen. Application was made not long since to the Court of Common Pleas by Sir John Karslake for a new trial of a cause which had been heard at Guildhall, on the ground that the special jury which had tried the case had not consisted of such elements as to possess even any moderate degree of capacity for dealing with a mercantile question in a satisfactory manner. It may quite confidently be assumed that in the case just referred to the state of circumstances which, apparently with much justice, formed the subject of complaint, arose from the accident that some infelicitous vein of special jurors had been struck by the summoning officer, and that the yield thence obtained was untempered by the admixture with it of the product of any sounder mine. It is a matter of simple arithmetical demonstration that if the entire City, and not merely some one, or two, small precinct, or precincts, within its area were to be taken as the recruiting field on all occasions when jurors are demanded, a special jury of so poor a quality as that which incurred the observation of Sir John

Karslake could not ever, according to all the distinct arithmetical conditions of probability, have existence.

It will thus be seen that no reliable judgment can be formed from any single example as to the result of any given standard of qualification until it has been ascertained whether the sheriff who has supplied the panel summons at all times from the whole body of the county, whether corporate or at large, for which he acts, or whether, under some private arrangements of his own devising, he draws upon limited portions of it only. Ample provision was made by the Juries Bill against the summoning by sheriffs on various independent systems of their own, of which the public has no knowledge whatever, and founded on their own caprice, convenience, or notions of expediency, by imposing on them under penalties easily recoverable, the observance of a rota. The objection that the system which is, as has been described, followed in the City of summoning the inhabitants of a whole street at a time economises the distance to be traversed by the summoning officer, would have been fully met by the provision of the Juries Bill, which required that all summoning should be by post, under certain prescribed arrangements. The direction to summon, by post, only, secures other advantages also, among which may be mentioned that it precludes, in the sole way probably in which this can be ensured, all attempts to corrupt summoning officers, and it thus relieves such officers from the imputations and suspicions of bribery to which they are now exposed.

It was proposed by the Juries Bill that in the City of London the managing directors of public companies carrying on their business within the City should be made liable to serve there as special jurors. In the absence of any express provision for bringing such officers within the scope of the Act, by enduing them with an ex-officio qualification, they would, as now, being neither rated nor paying rent, nor being, in any sufficiently full legal sense, occupiers of premises, escape service. The propriety of this measure will scarcely be questioned when it has been mentioned that there are nearly

1,500 of such companies holding premises in the City, and constantly using the courts as litigants, and since mercantile business is passing in a constantly increasing degree into the hands of companies, the burden of service on juries at Guildhall, which is now thrown on private traders only, would become more and more oppressive and unfair if the present total exemption of all the representatives of companies were to continue. The very moderate proposal of the Juries Bill was materially enlarged by the House of Commons by extending its terms so far as to reach not the managing director or manager only, but every director of every public company carrying on its business within the City. Some remonstrance or protest on the part of directors who have no semblance of actual occupation in their own persons of premises in the City, and who are only bound to attend occasionally at their respective offices, may probably be anticipated if the proposal to make them liable to serve as special jurors for the City should at any future time pass into law.

In conclusion, there are two remarks which may be made on the qualifications of common jurors as these stand defined by the Juries' Bill after its alteration by the House of Commons. The first of these is as to the lodger qualifications for special and common jurors. It will be seen that the terms of the clauses which set out the limits of these qualifications were so shaped by the House of Commons as to enact that "any man who shall have occupied for six months prior to the 24th of June in any year" any such premises as are afterwards described shall be qualified as a special or as a common juror, as the case may be, according to the annual value of the premises held by him. Hence, if a man occupies premises on any such terms as come within the scope of the clauses just referred to, he will be clothed with, and keep for his life, however much his social status may decline, the qualification which one such temporary occupancy may have at any time conferred. To preclude criticism, or a wilfully perverse compliance with the mere letter rather than what must be assumed to be the real

intention of the clauses in question, the language of the passages referred to should run, it is submitted, as follows—
 "Who shall have occupied for six months prior to the 24th of June in any year, and shall at the time when the jury lists are revised, be in the occupation of," &c., &c. The effect, no less than the frame work of the clauses, will probably be considered to be improved by the addition to them which has been suggested, since it is inexpedient that a man who relinquishes his tenancy even before the lists are revised should be returned as a juror. How, for example, would a summons to serve reach him?

The final observations to be made on the qualifications of common jurors, as settled by the House of Commons, has reference to the proper composition of common juries, which is the most important point in the whole system of trial by jury.

It was considered on the framing of the Juries Bill, for the reasons which were fully stated in an article on "Composite Juries," which appeared in the *Law Magazine* in the month of April last, that in accordance with the theory of English trial by jury, and in conformity with the practice which was rigidly insisted on and carefully followed from the very inception of the institution down to about fifty years ago, every common jury should contain a certain infusion of the special juror element. That every common jury ought to comprise some jurors of the higher class was twice emphatically pressed on public attention by the Common Law Commissioners, and was also urged by the Judicature Commissioners. In pursuance of those recommendations, as well as on every ground of clear expediency, it was proposed by the Juries Bill that the right composition of common juries should not be left to chance, which, as has been shown by absolute demonstration, must, and in practice does, in the great majority of cases, fail to produce the desired result, but that a proper and uniform quality should be secured to such juries by certain simple but effective arrangements devised

for that purpose. In Scotland this has always been done. The plan failed to win favour in the House of Commons. The discussion, however, which took place, supplies much ground for encouragement to those who hope that the proposal may receive fresh consideration, since good reasons may be pointed out for the belief that it was but imperfectly understood by Parliament and the public. It is submitted that if the proposal for "composite" juries be again rejected, then that the qualification for common jurors should be very materially raised.

For common juries should, according to sound and ancient custom, be those to be impanelled for the trial of all issues in the criminal and civil courts for the decision of which a jury is demanded, and special juries, with their attendant expense should only be employed in the relatively very small number of causes which present some exceptional difficulty. But common juries, composed as in the great majority of instances they now are, exclusively of common jurors, form a tribunal of baser quality and less capacity than will, in the contemplation of English law, serve the purposes of justice. Their existence, alien as it is to the mode of trial by jury which prevailed from the earliest times through many centuries downwards, dates only, as has been mentioned, from a very recent period, when the whole system of summoning and impanelling juries was permitted to lapse into utter illegality and confusion.

III.—ILLUSTRATIONS OF OUR JUDICIAL SYSTEM. PART XIII.

By W. F. FINLASON, Editor of the "Common Law Procedure Acts," of "Nisi Prius and Crown Reports," and of "Reeves' History of the English Law."

HEARING AND TRIAL.

THE characteristic of the Chancery system is that in cases which require evidence, and are not heard upon the statements in the bill, and the admissions in the answer, the evidence is taken first, and put in writing, and then the hearing takes place, with the fullest time for consideration and deliberation. This implies that, primarily and ordinarily, evidence is taken by deposition; but then, in many cases, there being not much dispute as to the facts, this is a convenient and economical course; for, as Lord Lyndhurst remarked in the debates on the Judicature Bill, in 1870, in Chancery cases there is not usually much dispute upon the facts, and even where there is, it is not so much as to the particular facts stated, but as to the inferences to be drawn from the different statement of facts deposed to on each side, both of which are mostly true, with some allowance for exaggeration. The truth generally lies between them, and can generally be discerned by a discriminating and experienced judge, with full time for consideration. It is a function which requires such consideration, and is far better performed in that way by a single skilled judge, able to weigh, estimate, and adjust the evidence on both sides, than by a tribunal of twelve men, taken at random, amidst all the hubbub of Nisi Prius. Indeed, even at Common Law, this has long been so plainly perceived, that unless where there is an irreconcilable contradiction of testimony as to the particular facts in evidence, it has become usual to take the facts admitted or ascertained, and to put them into a written form for the

· court to determine upon them, with power to draw inferences of fact, which is precisely the position of a Chancery judge on the hearing of most cases on evidence.

It is sometimes boasted by bigoted admirers of the common law system, that is, the bastard and perverted system now prevailing in courts of common law, which, for want of historical study of the subject, they fancy to be of common law origin, that it proceeds by jury trial, and that chancery does not. This is an entire error, and yet in the latest disquisition on the subject by a learned writer on equity, it is so stated, that chancery does not try cases by jury.* This was only literally true, and not really so, even before the acts of Lord Cairns and Sir J. Rolt, allowing trial by jury in Chancery. For even before these acts, the court sent to be tried by jury cases fitted for such trial. And now that it tries such cases itself with juries, it is in no sense true that Chancery does not use such trial. Chancery uses trial by jury far more wisely than courts of law do, for it uses that method of trial in cases for which it is fitted, and not in others. That this is the true rule is shown by the latest legislation on the subject; that of the Divorce and Probate Acts, which followed the Scotch and the Chancery system in prescribing trial by jury in cases for which it is fitted, and leaving others to the discretion of the court. This is a far better course than prescribing that mode of trial, cumbrous as it is, in all kinds of cases, whether or not it is suited to them. In some cases it is suitable, in others it is not so; the Court of Chancery can always direct such a mode of trial if it is suitable, and the reason it does not do so more frequently, is that by means of the admissions in an answer, evidence is often dispensed with altogether, and that in cases where evidence is taken, the court can always, where it is necessary, have a witness orally examined before it, and, on the other hand, by determining the case itself, it secures the inestimable advantage, the absence of which Mr. Burke long ago pointed

* Mr. Haynes "Fusion of Law and Equity," *Law Times*, 1872.

out as the incurable defect of trial by jury, the incapacity for consideration of written evidence, and the necessary inability for any due deliberation upon a great body of evidence, arising from the necessity for giving their verdict before separating. This defect in trial by jury utterly unfits it for the determination of any case in which there is a great body of evidence. The excuse urged by all common law eulogists of this mode of trial, that the judge, in such cases, takes the burden of guiding and directing the jury, is only an admission of the defect; for whence the necessity for such direction, but from the necessary infirmity of the jury, and if the judge is to assume their guidance on the facts, what is the use of incumbering himself with their awkward aid, necessitating, as it does, an immediate determination of the case, very probably so clearly erroneous that he will be bound to disregard it? It is strange that Common Law judges, who are constantly setting aside verdicts of juries as against evidence should persist in vaunting the value of a mode of trial they so set at nought! And surely the Chancery system is far more honest, as well as sensible, dispensing with trial by jury where it is not really necessary, rather than professing to use it, and then disregarding it as unsatisfactory. Vice-Chancellor Malins said he attached very little importance to the affidavits which had been read." * The case was one of alleged interference with light and air, and the Vice-Chancellor observed: "In these cases, there is generally exaggeration on both sides. But, on the other hand, upon matters of fact not really in dispute between the parties, written evidence is often very convenient, and may save expense of attendance and examination of witnesses. One of the great evils of the Common Law system is the rigidity of its rule, which requires the personal attendance and oral examination of every witness to a fact, which often causes vast expense and delay, either in the attendance of witnesses in court, or their examination by commission.

* *Times*, November 23.

The principles of the Court of Chancery on this most important subject were very well stated and illustrated by that able equity judge Lord Justice Giffard, in a case in which a bill was filed to restrain an alleged nuisance, and the defendant, after answer and evidence, desired an issue at law. The motion for the direction of issue to be tried in the cause was supported by an affidavit, which stated that since the interlocutory motion the defendant had been making alterations in the premises, by reason whereof the evidence previously filed on behalf of the defendant was rendered wholly inapplicable. Attention was also called to the great mass of evidence put in by the plaintiffs, who had served notice of motion for decree, to the necessity of calling scientific witnesses in answer, at a very heavy expense, and to the great conflict of fact in the case, which could only be satisfactorily disposed of by a jury on the spot after viewing the premises. The Vice-Chancellor having refused the motion the defendant appealed. On the appeal, he only asked that the first issue might be tried. Lord Justice Giffard said :—

“The first question to be considered was the abstract point of law—viz., whether the defendant was entitled to ask for an issue at the present stage of the cause. In his Lordship’s opinion this was a matter within the discretion of the Court. It would not do to lay down any hard and fast rule, and his Lordship thought that according to Sir John Rolt’s Act it was quite competent for the Court which had to try the case, to choose that method of trying it which it thought best. That Act imposed on the Court of Chancery the duty of trying a case completely, but did not render it incumbent on the Court to direct an issue, or to require a jury, in cases where it would not under the old practice have sent the matter to be tried at law. The power to direct an issue, which was reserved in the Act, was meant only to apply to cases where it was essential that the trial should be held in the country, and that there should be a view of the premises by the jury. This construction of the Act, his Lordship thought, was quite consistent with the cases decided since it was passed. What, therefore, his Lordship had to determine was whether, in his discretion, this case should be sent to a jury. His Lordship thought that the present application was made at an unfortunate time. Such applications ought generally to be made either upon a motion for

an injunction or a motion to dissolve an injunction, or in some cases at the hearing. His Lordship was of opinion that a defendant might make the application at other times than those, but he must then be prepared to show almost to demonstration that the case was one which the Court could not itself try. The present application was made after the plaintiff had given notice of motion for decree, when defendant knew the whole of the plaintiff's evidence, which was of course a great advantage to him. Was there, then, any reason why the Court could not try this case itself? The Vice-Chancellor thought that there was not, and, in the face of his opinion, the Court of Appeal would be very unwilling to come to a contrary conclusion, unless it saw some overwhelming reason why the Court of Chancery could not try the case. His Lordship could see no such reason here. He entirely denied that every legal question, or that every case of nuisance, ought to be sent to a jury. But it was said that there was something special in the locality in the present case. His Lordship, however, did not see why, if that were so, the Court of Chancery could not take it into consideration."

But wherever the case appears to turn on disputed matters of fact, which depend on the credibility of contradictory testimony, best decided upon by a jury, the Court of Chancery prefers that it should be tried by a jury. One of the first cases decided by Lord Selborne was one of this kind. A policy holder had brought an action against an insurance office, which they sought to retain—desiring to have the case heard in Chancery, on the ground that the policy was obtained by fraud. The Vice-Chancellor, however, refused to sustain the action, and the Court of Appeal approved of his decision.* The Lord Chancellor said:—

"The court was of opinion that no sufficient ground existed for disturbing the decision of the Vice-Chancellor. There was no question that the court had jurisdiction to entertain a bill in restraint of proceedings at law, especially in cases of fraud; and it might be assumed that a good equitable case was shown upon this bill, which, if proved, would entitle the plaintiff to relief in this court. But, on the other hand, it was peculiarly a case in which the court ought to be very cautious in exercising its discretion of interfering with the proceedings of the executor at law. When the term 'concurrent jurisdiction' was used it did not mean that

* *Hoare v. Bembridge*, *Times*, November, 1872.

each party could choose which jurisdiction he pleased; he must come either to law or a Court of Equity, according to the exact relief he might require. The assurance company could only come into equity before being sued at law, and ask to have the policy delivered up to be cancelled, while the executor had a right to bring his action at law to compel payment of the policy moneys under the contract. What the one party claimed as his right at law would constitute his defence in equity, and what the other claimed as his right in equity would constitute his defence at law; and in such a case the whole matter could only be brought in its integrity under the jurisdiction of equity by terms being imposed upon plaintiff at the price of the interference of this court, as, for instance, by his consenting to give judgment at law."

Let it be borne in mind that a Chancery judge can always, where the facts are in dispute, have the witnesses examined and cross-examined before him in court, and this is often done. Thus, in 1871, a nuisance case was heard before Vice-Chancellor Malins, in which this course was pursued. It was a bill and information filed against the Local Board for the district of Bishop Stortford, asking for an injunction to restrain the defendants from permitting any of the sewage or any water polluted with sewage or other noxious or offensive matter, to pass into the river Stort, in such a manner as to render the water of the river unfit for use, or a nuisance to, or injurious to the health of, the plaintiff, who rented a mill. The tenant was examined in court, and numerous affidavits were read in support of the allegations, and evidence given on both sides, the result being that the Vice-Chancellor was of opinion that the statements in the bill were grossly exaggerated.*

The great superiority of the Chancery system of trial as it now exists, with the advantage of uniting both written and oral evidence, and the immense advantages of a superior judge, a single mind, and of time for consideration and deliberation, must be manifest to any unprejudiced mind. The rude system of trial by jury, be it observed, never was intended

* *Times*, March 9, 1871.

for trial on evidence at all; even in early times when issues were simple and evidence short. And its incurable defect, as was observed by Mr. Burke, is the necessity for prompt decision, and the want of due time to digest and consider a vast mass of evidence. This is a defect which, of course, becomes the more marked in proportion to the length and perplexity of the case, and Lord Mansfield long ago observed that in such cases juries often miscarried. But, in the Court of Chancery, with a single judge, able to give continuous attention, aided by written and oral evidence, by written evidence on facts not in dispute, and with ample time for consideration, the longer the cause the more intricate the case, the more the superiority of its procedure appears. Take as an illustration the following case.* The former directors of the National Bank, jointly and severally liable for an alleged breach of trust in employing the moneys of the bank in discounting promissory notes of the Contract Company upon the guarantee of Lafitte and Co., which company was, in the year 1865, in process of formation, and was, as well as the Contract Company, subsequently ordered to be wound up. (The proceedings, of course, were most protracted and intricate.) And the Vice-Chancellor said that this involved considerations of such great importance as to the obligations of managers of companies, and of directors that his giving judgment now is out of the question. He must carefully consider all the evidence, which was of great bulk, and in the meantime should like to have the various documents, which were referred to in the course of the argument, supplied to him. The case, therefore, stood over for judgment. Now a jury could not possibly have dealt satisfactorily with such a case, unable to follow the mass of evidence, nevertheless compelled to decide upon it at once.

And, again, another important element in the Chancery method of trial by judge, which is also that constantly used in the Probate Court, is, that not only has the judge

ample time to weigh and consider the evidence, but he also is expected to adduce the grounds and reasons for the conclusions he comes to. This has two important results; first, that this compels him closely to consider the reasons for his conclusions, and next that if they are erroneous, they can be reviewed and set right by a superior tribunal. It is far otherwise with a jury, who not only have to decide at once, but give no reasons for their conclusions, so that the court cannot see upon what grounds they have proceeded, and cannot even see whether they were really unanimous, for half of them may have gone on one ground and the other half upon an entirely different, perhaps inconsistent ground. Thus in cases of any complication the decision of a jury is really a blind leap in the dark, and a mere game of chance played blind-folded; compare this method of proceeding, in which no one can tell whether they are right or wrong, because no one can know on what grounds they have proceeded, with the clear and luminous conclusions upon the facts of, experienced and practised judges like Lord Justice James, or Lord Cairns, or Lord Selborne. Let it be borne in mind that the Equity judges may have all the advantages of a jury in respect of oral-examination and cross-examination, and seeing and hearing the witnesses, with the immeasurable advantages of vastly superior intellect, practiced and experienced faculties, close and continuous attention, unity of mental application, ample time for consideration. Let any sensible and intelligent man consider whether it would not be infinitely more satisfactory to a suitor to have his case decided on the facts by skilled and experienced judges, with all the advantages of ample time or consideration, rather than by a jury, taken hap-hazard, amid all the hurry and hubbub of sittings or Assizes, and called upon to decide at once.

Appellate tribunals must of necessity, under any system, judge of the facts on evidence reduced to writing, whether taken orally or not. It is so even in the common law system of trial, under which new trials are moved for on the judge's notes, usually very imperfect. It is impossible to have an

appeal, properly so called, upon the facts, in any other way, for if the witnesses were orally examined again, as is the case at Quarter Sessions, or on a second trial, it would not be an appeal, but a rehearing, or a new trial; and it would be impossible to exclude additional evidence or to ensure the repetition of precisely the same evidence, neither more nor less. But an appeal, properly so called, must be on the same evidence. And for this, the Chancery system affords very great facilities in the evidence being all, however taken, reduced to writing, for it is then fixed in form, and available for any appeal intermediate or final. And it is a great advantage to have the means of submitting the whole of the evidence in a case in a form full and accurate, and not meagre and imperfect, to the consideration of superior judges upon appeal, and it enables them to give it their most ample, and deliberate consideration, and form clear conclusions upon it. It is true they do not see and hear the witnesses, but so neither does a court of law when it upsets a verdict on imperfect notes of the evidence, nor does the Privy Council when it reverses a decision of the Admiralty. And, as already mentioned, it is virtually impossible to reproduce oral evidence orally.

To be continued.

THE SPRING CIRCUITS.—The judges met on the 15th ult., in the private room of the Lord Chief Justice, and chose the forthcoming spring circuits as follows, viz.:—Home—the Lord Chief Baron (Sir F. Kelly) and Mr. Justice Lush. Oxford—the Lord Chief Justice of Common Pleas (Lord Coleridge) and Mr. Baron Cleasby. Northern—Mr. Justice Denman and Mr. Justice Honyman. Western—Mr. Justice Keating and Mr. Justice Grove. Norfolk—Mr. Justice Blackburn and Mr. Justice Brett. Midland—Mr. Justice Archibald and Mr. Baron Pollock. North Wales—Mr. Baron Pigott. South Wales—Mr. Justice Quain. The Lord Chief Justice remains in town.

V.—CHANGES IN THE JUDICATURE.

THE retirement of Baron Martin and the appointment of Mr. Amphlett mark most emphatically the change in our judicial system. Before the passing of the Judicature Act no such change would have been possible, and, on the other hand, that measure rendered such a change at once desirable and practicable.

So long as there were courts occupied only with the cases which come within the narrow range of the common law, that is, the cases tried at *nisi prius*, the judges appointed to those courts were naturally taken from the practitioners in those courts, and were chosen chiefly for their success at *nisi prius*. But when, by the Judicature Act, these courts became divisions of a larger court, in which all jurisdictions were blended, and more especially that of equity—one branch of which, that of bankruptcy, is to be vested in the Exchequer division—the choice of judges not only *need* no longer be restricted within the same narrow range as before, but *could* not properly be so, if the success of the new judicial system had to be secured. And there is, it is to be added, peculiar fitness in appointing an Equity Judge to the Exchequer, since that court, law, and equity, have always been administered, and, in the revenue jurisdiction, they have always been united.

In the time of Mansfield and Hardwicke the leading men practiced in both jurisdictions, and knew the necessity of the *quitable* system, and so, when judges, they sought to work the two systems more in harmony. Under the modern system the jurisdiction became more separated and estranged, and so did the practitioners in each; and hence the common law men, seeing less of equity, and its superiority, became more and more blindly bigoted to their own rude and ineffective procedure. This change for the worse advanced more rapidly after that absurd and mischievous

CHANGES IN THE JUDICATURE.

measure, which took place thirty years ago, the abolition of the equity side of the Court of Exchequer, which, though separate from the common law side, afforded a tribunal in which Law and Equity were seen, side by side, and in which practitioners were trained and experienced in the reasoning of both. That court, however, was abolished, and practitioners arose, more and more estranged from equity, and attached to the rude and clumsy procedure of the common law. Under this system Baron Martin had been trained, and in upholding it he passed more than twenty years of judicial life. Even though one of the Common Law Commissioners, and no doubt, according to his light, desirous of improvement, the habits of thought formed by a Common Law training fettered the minds of the Common Law judges too strongly to admit of his even comprehending any really effective changes in procedure. Thus, for instance, when the legislature had enacted that equitable defences should be pleadable, the Common Law judges came to a decision which neutralized the enactment, by requiring, in violation of the plainest principles, both of equity and of pleading, that the plea should set forth a case for an immediate, absolute, and unconditional injunction. Of course, there could hardly be a case in which this could be done, and the enactment was at once rendered nugatory. So, in every instance, as for example, as to discovery and interrogatories, the effect of the decisions of the Common Law judges was often to cripple and injure and obstruct the operation of the Common Law Procedure Acts. This is not intended as any reproach upon any of the learned judges, who only represented the inevitable result of a training confined within the narrow scope of the Common law.

It is obvious that such a type of judge would be ill-fitted to co-operate in carrying out a new and comprehensive judicial system, blending, in its enlarged and ample scope, all jurisdictions, and requiring for its administration men, not merely acquainted with the various rules of Common

Law, but versed in the principles of jurisprudence, and with minds also enlarged and liberalized by much mental culture. At the same time it was desirable, if possible, to unite with these qualifications some acquaintance with Criminal Law, and some experience of trial by jury.

Now all these qualifications were happily united in Mr. Amphlett, a member of the Equity bar, therefore necessarily acquainted not only with the Common Law, which is included in Equity, but with those principles of jurisprudence out of which Equity is drawn, a man of culture and of scholarship, as well as legal learning, and one, also, who had had judicial experience in a Common law court, having presided for years as chairman of a Court of Quarter Sessions. In the whole profession there was probably but one man who united these important qualifications, and it is impossible not to see that they are as valuable as they are rare, and that Mr. Amphlett is just the type of man to be desired under the new judicial system.

No wonder, therefore, that our legal contemporaries, approve of his selection. He is known to have taken a great interest in the improvement of the education of his profession; and when Sir Roundell Palmer became Lord Chancellor, Mr. Amphlett was chosen his successor in the presidency of the Legal Education Association. He has also supported in Parliament the reform of the bankruptcy laws. The *Law Journal*, when the appointment was first rumoured, rose superior to narrow prejudices. It observed—

“The rumour of the appointment of Mr. Amphlett has been received with some surprise. Since the abolition of the old equitable jurisdiction of the Court of Exchequer, no barrister from the ranks of the Chancery bar has been seated on the Common Law bench. But the Lord Chancellor could not be blamed if, on the eve of the coming into operation of the Judicature Act, he displayed anxiety to blend the Common Law accomplishments of the Court of Exchequer with Chancery learning and experience. Especially is such a course justifiable in the case of the Court to which Bankruptcy business is to be transferred. Mr. Amphlett is certainly a gentleman whose promotion would command universal approbation. He has been nearly forty years at

the bar, and occupies a high position both in the law and in Parliament."

And upon the announcement of the appointment our contemporary adhered to its opinions.

The *Law Journal* observes of the recent appointment that the "Lord Chancellor has acted wisely in selecting the new Baron from the Equity Bar, and further that the choice of Mr. Amphlett is one which will command universal approbation." We entirely concur with our contemporary, who also adverts to the high scholarship of Mr. Amphlett, and his zeal in the cause of legal education as an additional reason for granting the appointment.

The *Law Times* observes that the Lord Chancellor in appointing Mr. Amphlett did not promote a political supporter :—

"Mr. Amphlett, according to Dod, was not a Liberal, but a Liberal-Conservative ; but although not a political ally, on all professional matters he was a sincere coadjutor of the Lord Chancellor, and quite as eager and liberal a law reformer. It is interesting to know what the solicitors think of the appointment, and we have received an expression of opinion which we reproduce. A correspondent writes :—
"Having in view the jurisdiction in bankruptcy matters which the Judicature Act throws upon the Court of Exchequer, it appears to me that the appointment of an equity counsel was very judicious. I am pleased to know that there is some prospect of law and equity working together in the Common Law Courts, as the trial of a similar working in the courts of equity has proved a success. If the Judicature Act is to be properly worked, Common Law and Equity judges must sit side by side. The presence of a judge who has had a training in equity principles, will prove of vast use in duty questions which are practically left solely to the decision of the Court of Exchequer."

These remarks of a member of the most practical branch of the profession, embody, it will be seen, the conclusions at which we were led by a retrospect of our judicial history for the last half century or so, and we need hardly say that we entirely agree with them. We are well aware that there are grumblers at the Common Law bar, who, still attached to the traditions of the old system, quite resent the appoint-

ment of an equity man in what they still persist in supposing to be a Common Law court. But they forget that the Court of Chancery is a Court of Common Law, and that the Court of Exchequer was a Court of Equity as well as law, and that it still is so in revenue cases, and that the new system, after all, is as much in harmony with legal history as the new appointment is in harmony with the new system. They affect to wonder what the new judge will do at *Nisi Prius* and on circuit, and fancy him ignorant of criminal law and the rules of evidence! They forget that the rules of evidence are the same at law and equity, and that the new judge has had an experience in trying prisoners, which few of the Common Law judges have had. As to *Nisi Prius*, all cases of the least doubt or importance are reserved, and the only thing to be regretted is that judges of such learning and ability as Mr. Amphlett should have to waste their time and talents in the mere trial of questions of fact.

A knowledge of equity, which includes law, necessarily implies a larger knowledge of law and legal principles than falls to the lot of most Common Law practitioners, with the knowledge of equity superadded. On the whole, therefore, the appointment of Mr. Amphlett is in every point of view eminently creditable and satisfactory, and may be regarded as marking an epoch in our legal history, and as an event of happy augury for the success of our new judicial system.

BAR EXAMINATIONS.—The Council of Legal Education have awarded to John Alderson Foote, Esq., of Lincoln's Inn, and William Ebenezer Grigsby, Esq., of the Inner Temple, Studentships in Jurisprudence and Roman Civil Law, of one hundred guineas, to continue for a period of two years; to John Henry Martyn Weitbrecht and John William Gustavus Leo Daugars, Esqs., of the Middle Temple, Studentships in Jurisprudence and Roman Civil Law, of one hundred guineas, for one year; to John Edward Courtenay Bodley, James Kinder Bradbury, Avetick Arratoon Shircore, William Eaton Young, Esqs., of the Inner Temple, and William James Howard, Esq., of the Middle Temple, certificates that they have satisfactorily passed a public examination.

VI.—THE TICHBORNE TRIAL.

COMMITMENTS FOR CONTEMPT.

THE committal of Mr. Whalley for a supposed contempt in the publication of a letter expressing an opinion on the evidence of a witness, has raised again the question of the power of the Courts of Law in such cases. We are so highly sensible of the patience, tact, and temper, which the judges have displayed in this protracted trial, in which their patience has been so sorely tried, that it is with as much reluctance as diffidence, that we venture to intimate a doubt as to the existence or extent of the legal power they have assumed themselves to possess. Assuming its existence, every one must feel that it could not have been exercised with more moderation and consideration. But lawyers are discussing among themselves, on this, as on the former occasion, whether any such power exists, that is, a power to punish for supposed contempts out of court, and not amounting to any obstruction or interference with the process or proceedings of the court, nor even to an attack upon the court, but merely to the expression of opinion on the evidence while a trial is pending. We have already, in the early part of last year, given our grounds and reasons for holding that no such power exists, but that the power of dealing with contempts is limited to insults and interruptions in the presence of the court, or to obstructions, or disobedience of its process. Since then, the Court of Queen's Bench (in the case of Mr. Lefroy) has held that this is so as to inferior courts of record, which it distinguished in this respect from the superior courts. But, with every respect for the judges of that court, there is no authority for that distinction, and the doctrine of contempt of court is laid down with the above limitation as to all courts of record. And in the only case in which a larger power of dealing with contempt out of court was claimed and exercised, the case

of the *Observer*, the fine was not enforced, and the decision of the judges failed to command the approval of the profession. A learned treatise was written against it, and in a subsequent case, so clear was it that it was not law, that two judges at the Assizes overruled it and refused to act upon it. It is most remarkable that in 1828, some years after the case of the *Observer*, a case occurred on circuit far stronger in its character, and yet the two judges of the Assize (one of whom was Mr. Justice Littledale, a judge of the Court of King's Bench) declined to act on the authority of the former case, though it was cited and pressed upon them. A prisoner was about to take his trial for murder; the case had excited great interest, and inflamed accounts had been published in the newspapers respecting the prisoner as the murderer. (*Rex v. Gilham, Moody, and Malken*, 165.) During the Assize, an artist was exhibiting in the Town Hall of the Assize town, models of the victims, and of the prisoner as the murderer. The counsel for the prisoner moved that the man might be apprehended, and committed for a contempt, as the exhibition was calculated to prejudice the minds of the jurors, and likely to deprive the prisoner of a fair and temperate trial. He cited the case of "*Rex v. Clements*" as a precedent; but Mr. Justice Littledale, after consulting with Mr. Justice Gaselee said: "I think the exhibition highly indecorous and improper, and one that may subject the man to punishment, but it does not appear to me or to my learned brother to be a Contempt: therefore, I cannot interfere in the mode proposed—to commit the person exhibiting." This decision alone might well excuse our doubting the existence of the power now claimed. And it has been followed and affirmed by repeated decisions in the same Court, the Court of Queen's Bench. In *Vansandau's* case, in Lord Denman's time, the contempt was distribution of papers in court, and the judgment seems to imply that a contempt of that kind must be in the presence of the Court (*Vansandau v. Turner*, 6, Queen's Bench rep.) Again on the great question of privilege, Lord Denman had to consider the whole

doctrine of contempt, and laid down that it only applies either to "insults to the Court, or obstruction of its proceedings." The only cases that have since occurred—in fining a sheriff for supposed disrespect to the judges at the assizes—are all of doubtful legality, but if legal, must be referred to the former head. It is to be borne in mind, moreover, that they all rest upon the duty of the Sheriff as the officer of the Court, so that they are in no degree in point in cases like the present. In America, we believe, the general view of the law on the subject is that which we have laid down, and certainly in more than one State legislation on the subject has so defined it. On the whole, therefore, though we do not think it proper now to enter further into the subject, we venture to say that our doubts as to the existence of the power are not removed.

LEGAL TOPICS.

THE SCOTCH BENCH. — By the resignation of Lord Cowan, and the death of Mr. Sheriff Glassford Bell, two vacancies have been caused in High Judicial Office in Scotland. Lord Cowan, who was the oldest of our Supreme Judges, having been on the Bench since 1852, and who has unfortunately been laid aside through a severe illness, will be greatly missed. He was well read in Scots law, and was a man of great sense and considerable business capacity. Hardly less important than the vacancy caused by Lord Cowan's resignation is the one occurring through Sheriff Bell's death. The jurisdiction of the Sheriff in Scotland as a judge of the first instance is unlimited in commercial cases. And in a county such as Lanark, embracing as it does the city of Glasgow, it requires no vivid imagination to realise to some extent the amount of judicial work to be performed in connection with commercial cases alone. But that gives but a faint notion of the duties

of the vacant post, the Sheriff in addition, being a criminal judge and a high county official, to whom much important work is entrusted. The late Sheriff was possessed of strong and highly cultivated intellect, and perhaps the best testimony to his capacity for the high office which he held is the fact that although he succeeded such a man as Sir Archibald Alison, he did not lose by the contrast. The vacant sheriffship has been conferred on Mr. William Gillespie Dickson, advocate, Senior Sheriff Substitute at Glasgow. Mr. Dickson, who is the author of a really excellent book on the "Law of Evidence," and a lawyer of great accomplishment, was for several years Procureur General for the Colony of Mauritius. The appointment is highly approved of because it would be extremely difficult to get a practising advocate whose learning and capacity is superior to Mr. Dickson to give up the higher prizes of the profession while it would never so confer such an important appointment on a second rate man. Mr. Dickson having left the bar before he had time to take a leading position, has not higher prizes open to him. The appointment is not a desirable one, it brings more dignity than ease; and as for the pay it bears no proportion to the work. The gentlemen who gets the appointment will be expected to sit in court every day from ten to four, and to read up his cases and prepare his judgments at home in the evening, and all for the handsome salary of £800 a year, or a third of what he should make at the bar for the same amount of work.

LEGAL PRACTITIONERS SOCIETY.—This Society seems fully constituted. The first meeting has been held, and Mr. Ford, the honorary secretary, writes to state:—"Our rules were drafted some weeks ago, and are being now settled by a committee appointed for that purpose. No communication has as yet been addressed to the Lord Chancellor asking him to receive a deputation from the society. There is no disposition on the part of this society to condemn the Incorporated Law Society, and we look for

their assistance in our efforts." And no doubt they will have it. An Attorney writes to say :—" I am pleased to see that at last the legal profession are opening their eyes to the injustice which those persons styling themselves 'accountants' have practised, and are still so extensively practising, on them. The public do not seem to know that an attorney is an officer of the Superior Courts, and consequently subject to its supervision as such. The public, I quite agree, under the circumstances, suffer quite as much from the 'quack lawyers' as the legal profession. I, for one, do hope that decisive and stringent measures will be taken in order to put an end to this condoned 'legal quackery.'" In this we entirely concur, but why does not the Incorporated Law Society interfere in the matter ?

CONSOLIDATION OF COUNTY COURTS.—The following circular, which has been issued by the Lord Chancellor to County Court judges clearly has reference to projected consolidation of the County Courts. " I am directed by the Lord Chancellor to request that upon a vacancy occurring in the office of registrar of any court of which you are the judge, you will, before filling up such vacancy, acquaint his Lordship with the fact, in order that the circumstances of the court and the propriety of discontinuing it may be considered. When the registrar shall have died without having appointed a deputy, his Lordship will be obliged if you will be good enough to provisionally appoint a person to discharge the duties of registrar (19 and 20 Vict. c. 108, ss. 12, 13). Where a registrar is desirous of resigning, I am to request that you will ask him to be good enough not to do so until you shall have communicated his wish to his lordship, and received his decision as to the propriety of continuing the court." Mr. Rothery, one of the Judicature Commissioners, prepared a scheme for consolidating the County Courts, and the commissioners recommended that the object should be carried out as far as possible. This circular, coupled with the recent proceedings as to the Surrey County Courts, clearly indicates that the recommendation is to be carried out.

EXCLUSIVE PRACTICE AT CIRCUITS AND SESSIONS.—We observed a statement in our respected contemporary, the *Law Journal*, to the following effect : “ At Sessions, whether for county or borough, there is a privileged bar, and no outsider can be heard unless he be especially retained, and some member of the bar of that Sessions be retained with him as junior.” This is hardly accurate. A privilege if it can be enforced is a right. We know of no sanction by which one barrister can prevent another being heard in court, and we know of no machinery by which the court could enforce the right. Every judge is bound to hear every English barrister. Our contemporary, like the Recorder of Cambridge, has confounded the practice of the bar with the privilege of the bar. There is, therefore, no such legal right, but the present practice of the bar in maintaining close circuits or sessions is founded on a natural feeling of delicacy, as interfering with the professional practice of those who have for years been at the expense and trouble of attending the circuit or sessions. This is a laudable feeling, but there are some in the profession who object to a rigid rule on the subject, and perhaps this is one of the questions which may be dealt with by the new Society.

APPOINTMENTS.

Mr. R. P. Amphlett, Q.C., has been appointed a Baron of the Exchequer ; Sir John W. B. Mansell, Bart., Vice-Chairman of the Camarthen Quarter Sessions ; Mr. J. E. Davis, Legal Adviser to the Metropolitan Police Force ; Mr. H. A. Adamson, Town Clerk of Tynemouth ; Mr. R. M. English, Clerk to the Magistrates of Stamford. The following Solicitors have been elected Coroners :—Mr. H. M. Jackaman, for Ipswich ; Mr. Henry Dean, for Northern division of Leicestershire ; Mr. William Gilbertson, for the Amounderness Hundred of Lancaster.

BOOK REVIEWS.

ON BUILDING CONTRACTS.—By E. JENKINS and JOHN RAYMOND, Esqrs.—This book comes before the public under singularly favourable auspices. It is not only dedicated “by permission” to the Royal Institute of British Architects, but has been revised before publication by the Professional Practice Committee of the Institution of whose suggestions in various particulars the authors have not been unmindful. The work, therefore, may be said to have received an official sanction at the hands of those most competent to form an opinion as to the practical utility of a work of this nature, and its acceptance by the Institute, after such examination, is a pretty plain indication that it fully addresses itself to the requirements of the intelligent professional man for which it is written, and is not defective in the special knowledge without which the subject could not be successfully handled. The authors in our opinion are entitled to take credit to themselves for their praiseworthy attempt to supply what must be admitted to have been a want in legal literature. The work, as will be seen by the title, is the joint production of Mr. Edward Jenkins and Mr. John Raymond; but while Mr. Jenkins admits his liability for its contents, he informs us in the preface that owing to pressing engagements he was prevented from writing himself, and awards to his coadjutor the merits of his performance.

In his neat preface, Mr. Jenkins says: the work is specially intended for “the man who wishes to build, the man who designs, and the man who erects the building.” Our examination of the book, however, convinces us, that though doubtless excellently adapted for its admitted purposes, it will prove a serviceable book to lawyers as well. It would be doing it an injustice to class it with the rank and file of legal hand-books. In tone and style it resembles Lord St. Leonard’s well-known popular treatise on the law of real property. The writer conceives his subject clearly, and writes in a manner that is pleasant, forcible, and lucid. He has fortunately perceived that a mere collection of cases with comments appended thereto, and references to abstract rules of law and legal maxims would not suffice to convey to the minds of architects and builders a clear and comprehensive view of their legal position in respect of their daily engagements in the

regular practice of their profession or business. On the contrary, his aim throughout is to look at the matter from the reader's point of view, and address himself to the questions which he is likely to ask, and which a book can be reasonably expected to answer; for with regard to questions of any unusual perplexity, the author very properly cautions the layman that his only safe and prudent course will be to take counsel of the legal profession, and not to seek in his pages a final solution of his difficulties. But every intelligent man, whatever his vocations, finds it his interest, and indeed, a matter of necessity to know as much as he conveniently can of the law which affects his daily business pursuits, and to such this book will in its proper sphere be found of the greatest assistance. The legal relations of architects, builders, and employers in general, are pointed out in a methodical and intelligible manner. After a few preliminary remarks on the nature of contracts in general, the writer takes us through the various stages involved in what are called Builder's contracts, from the preliminary drawings to the certificate, and each step is sensibly discussed in connexion with its legal incidents. In the appendix we find a collection of statutes and extracts from statutes that concern builders; a collection of "forms" which will probably be found useful for guidance, and what seems to us to add greatly to the value of the book, for purpose of reference, the schedule of rules authorized by the Institute, for regulating professional practice and the charges of architects. We are bound then to state in conclusion our opinion that the book before us is a work of remarkable merit, and we anticipate for it a career of considerable usefulness.

INSANITY IN ITS RELATION TO CRIME. By WM. A. HAMMOND, M.D., Professor of Diseases of the Mind, &c. (New York.)—This is another work upon the test of insanity, or rather the test of responsibility in the insane. We have recently had various works upon the same subject published in this country brought under our notice. Some of those by medical men have claimed the irresponsibility of the insane; others, written by lawyers, have laid down a more rational test of the irresponsibility of those persons who labour under mental disease. Dr. Russell Reynold, in his "Legal Test of Insanity," was in favour of the former view; and Mr. Balfour Browne, in his "Medical Jurisprudence of Insanity," "Responsibility of Diseases," has expressed himself in favour of the existing legal tests. Strange to say, Dr. Hammond has followed very closely in the steps of Mr. Browne, and argues that "the knowledge of right and wrong is a test of responsibility." Again, he says, "the only

form of insanity which in my opinion should absolve from responsibility and, therefore, from any other punishment except sequestration, are such a degree of idiocy, dementia, or mania, as prevents the individual from understanding the consequences of his act, and the existence of a delusion in regard to a matter of fact which, if true, would justify his act." Now this is precisely the opinion of the judges expressed in the answer to the questions submitted to them after the trial of M'Naughton, and which has been defended against Dr. Reynolds by Mr. Browne. Dr. Hammond very probably repudiates the common alienist-view of irresistible impulse, and says:—"The doctrine that an individual can be entirely sane immediately before or after any particular act, and yet insane at the instant the act was committed, is contrary to every principle of sound psychological science." We have all along been confident that medical men would in time come to see the correctness of the jurists' view of crime in relation to insanity, and it is, therefore, satisfactory for us to find that Dr. Hammond, one of the most distinguished of American psychologists, stating this belief in the correctness of these principles. It is an interesting work, well written, with well written and illustrative cases; but we cannot see that he has advanced in any one particular upon the principles stated in Mr. Browne's work already referred to. Its chief interest is that it comes from a medical man, and a distinguished one; and that he admits that insanity is not to be regarded as a ground for exemption from punishment, and that right or wrong is a good enough test of responsibility. He remarks, with truth, and it would be well if medical men would remember the past, that the attempt by man to reconcile the principles of abstract right with the customs, the obligations, and the securities of society will always be a vain effort."

A TREATISE ON THE LAW OF SCOTLAND RELATING TO LAND AGENTS. By John Henderson Begg, Advocate.—The agitation which had for some time existed in regard to the distinction between attornies, or agents as they are called in Scotland, practising in the Supreme or Inferior Courts, was recently ended by the passing of the Statute 36 and 37 Vict., cap. 63; and Mr. Begg, who had been diligently preparing this work for some time prior to the passing of that statute, was in the favourable position of being able to publish at the very time when it was sure to be in the greatest demand. The Statute mentioned has introduced a *possible* revolution into the conduct of legal business in Scotland. Now, every solicitor *may* practice in *any* court of law,

while formerly no solicitor was allowed to practice except in the court by which he had been specially admitted. In future we shall have one general body of solicitors with equal rights and privileges. Many of the gentlemen who practised in remote country places have thus important privileges conferred on them, but it follows that these privileges bring with them graver duties and wider responsibilities. A book capable of keeping them right in this new state of matters is certain to be anxiously sought for, and Mr. Begg's book is well calculated to satisfy their consciences and solve their doubts. But we are bound to say a great deal more than that in praise of Mr. Begg's labours. His book is precise, accurate, and methodical, is an excellent exposition of a very complicated branch of the law of Scotland. It is not too much to say of it that one can think of it as being entitled on account of the research learning and power of exposition displayed by the author, to be placed almost the same class with Mr. Fraser's great work on the "Personal and Domestic Relations," and Mr. McLaren's work on the "Law of Trusts,"—books whose praises are in all the courts. Altogether the book will be found to be both useful and interesting, and will not fail to extend the high repute in which the author is held by all who know him.

THE INDIAN LAW EXAMINATION MANUAL. By Fendall Currie, Esq., (of Lincoln's-inn,) City Magistrate of Lucknow.—Such a publication as the present has, we are sure, been much wished for among students and others intending to pass examinations in the various branches of Indian Law, as well in England as in India. The form of the work, namely, that of Question and Answer, seems to us peculiarly fitted for the object which the author has in view, of providing students with the subjects in which they have to be examined, in a shape easy to commit to memory. But the greatest merit of the work in our opinion is, that it is so exhausted, comprising, as it does, besides the subjects of the Hindu and Mohamedan laws, all Codes and Acts now in force in India, namely, the Criminal Procedure Code, Indian Penal Code, the Code of Civil Procedure, the Evidence Act, the Limitation Act, the Succession, Contract, Registration and Stamp Acts, concluding with the Law of Mortgage as applied in India. Of course the student who is anxious more thoroughly to master the Hindu and Mahomedan laws than by reading a bare outline of those subjects, such as Mr. Currie's book necessarily is, must consult the learned works of Strange and MacNaghten on Hindu law, and MacNaghten and Baillie on

Mahommedan law. We notice, however, with satisfaction that the author relies largely on text books of the latest date, such as Cowell's Tagore Law Lectures, and Grady's books on Hindu and Mahommedan Law; and we are especially glad to see that as regards Hindu law the principles are supported by numerous cases. We notice, too, that the author treats the Hindu marriage as a purely civil contract. He forgets to look at it in its far truer character of a sacred and solemn sacrament which every Hindu is indispensably bound to receive alike for spiritual as for temporal purposes.

THE INTERMEDIATE EXAMINATION GUIDE: Vol. 2, Addendum to Equity. (By E. H. Bedford.)—The author is well known by his useful publications in aid of Students, and the present one well supports his reputation. The book appointed by the examiners on the subject for 1874 is *Haynes' Outlines of Equity*, and the nine sections are devoted to the subject, with reference both to the principles and the practice; the latter, with reference to *Hunter's Suit in Equity*, under the first division, the various heads of equity are clearly and succinctly set forth under their different titles—accident, power, or mistake, or set off, or specific performance, &c. Under the other branch the various steps and stages in a Chancery suit are set forth with great clearness and distinctness, in the usual way, by means of question and answer. We observe that the work has been perused and revised by Mr. Ernest Witt, a gentleman of scholarship and of some promise in the profession.

CONTEMPORARY LEGAL JOURNALISM.—Our contemporaries, the *Law Journal* and *Law Times*, have commenced the year with all their usual vigour and ability. Every week some one or more legal topics are treated of, with reasoning and ability in their columns, and their contributions must greatly aid in the discussion of legal questions. They have both of them given some attention lately to the questions on the law of husband and wife, arising under the Married Women's Property Act of 1870. The great question it has given rise to, is whether married women, whose earnings are protected, are liable to be sued by their creditors. County Court judges have held that they are not, and our contemporaries approve of their decision. Our contemporaries, also, have of course their attention directed to the approaching operation of the New Judicature Act, and from time to time correspondence, articles, or observations appear in their columns on the subject, which is naturally one of great professional interest.

The *Law Journal* has had an article on a recent decision of Vice-Chancellor Malins declining to send a case for trial before a jury, to which we shall have occasion to advert hereafter. Our contemporary appears to imagine that the Vice-Chancellor's view is at variance with the principles of the Judicature Act, but as we read the Act it is quite in accordance with the Vice-Chancellor's view.

Attention is being called in the *Law Times* to that important part of the Judicature Act which relates to the local courts, and the local institution of suits in the Superior Courts by means of the Registrars of the County Courts, who appear to be the points of connection and contact between the two systems of the local and Superior Courts. In the meantime the consolidation of the County Courts is proceeding, and has given rise to some dissatisfaction in the districts apparently deprived of the benefit of local courts for small debts.

We have to thank our contemporaries for their kind and handsome notices of our new editorship; but we venture to correct an error of our contemporary, the *Law Times*, in imagining that the Editor is not aided by other contributors. He will see in our present number more than one very honoured name; and we can assure him that we have the assistance of very learned and able contributors, though their modesty may sometimes prevent them from putting their names to their contributions.

Our contemporary, the *Irish Law Times*, has had a very able series of papers on the County Courts; the effect of which appears to be to adopt and enforce the view taken by Mr. Lascelles, a member of the English Bar, in his recent pamphlet entitled, "The Expansion of the County Courts, the true basis of Legal Reform." At all events, our contemporary is of opinion that to render a judicial system complete and effective, the County Courts ought to be improved and brought into close connection with the superior courts, and in this we entirely agree. Our contemporary, also, has had some valuable articles on the subject of "Land Transfer," which may be studied with advantage by those who take an interest on that subject; especially as in Ireland they have had the benefit of a great deal of practical experience under the Encumbered Estates Act, and the Land Act of 1870, with respect to the transfer of land, and especially with reference to title. These are the subjects which are greatly elucidated by such discussions in print.

The *Scottish Journal of Jurisprudence* is very ably conducted, and the last number contains some articles of interest, especially on the Judicature Act. We shall return to it.

The July number of the *American Law Review* contains an article on "Dumpor's Case," which has some interest with reference to the history of law. As Story observed, the courts in America were less fettered than are ours by the rigid rules of the common law, and were more at liberty to give them a literal and sensible construction. Nevertheless as they adopted the common law of England they were often embarrassed by its technical rules, the results of the scholastic spirit of the Middle Ages. This was peculiarly the case with the "rule in Shelley's case," which Lord Mansfield reprobated as the result of feudal notions, and the "rule in Dumpor's case," which is a mere piece of technical absurdity. The courts in America were rather embarrassed between their respect for the traditions of England and their sense^{as} to the unfitness of these rules in modern times. We believe Shelley's rule has been little observed, and a history of its operation in England and America would be of some interest. The article in the *Review* now before us gives the history of Dumpor's case in the English and American courts, and it is written with great learning and clearness; and it is of great interest, ^{to} those who wish to study the history of law. On the whole, the case does not seem to have had much influence in America, and the principles of the most recent decisions appear to get rid of it entirely. There is a philosophical article—a continuation of a former one—on the theory of Torts. The present essay is directed merely to the theory on which the jury takes a part in the decision of cases, and is directed to show it depends on the decision of the court whether they should be appealed to or not, and whether, having clearly decided to the satisfaction of the court, this view would be still taken of the same questions raised again or accepted as law, according to the view of the able writer of the article, the verdicts of juries form one of the sources of law, and no doubt in a certain sense, this is true. It illustrates the truth of Maine's remark of ancient law, that it was the gradual generalization of particular judicial decisions. The writer thinks that the legal liabilities defined by a book on torts are divided into those in which culpability is an element and those in which it is not, but that the latter are divided into cases where the facts which fix the liability are distinctly ascertained, and those where the boundary line is in course of ascertainment, or, from motives of policy, is kept purposely indefinite. He seems to us, however, too much to confound torts with breach of duty, and speaks of an assault, for instance, as a breach of duty, so he speaks of a duty not to defraud. But surely a tort is an act *per se* wrongful, as a slander,

an assault or a fraud, all of which are wrongful without reference to duty. But negligence necessarily implies a precedent duty or obligation to do some act or to do it in a particular way, or with reasonable care. This is the substantial distinction to be deduced from the authorities of our law, and the sound sense of the subject. The article, however, is written in a philosophic spirit, and will well repay perusal, by exciting the mind to reflection on the principles of law. There are also interesting papers on accident insurances and the abuses of bankruptcy law.

In the *Albany Law Journal* (Nov. 9) there is a varied judgment on the question of damages, the measure of damages for the conversion of stock, which as our contemporary observes: "presents a very full and able consideration of the rule as to damages in cases of this class;" that is, where the plaintiff had not an absolute property, but only a contingent or speculative interest in it. There is also an able article on "Recent Telegraph cases," in which the English and American cases on the subject are noticed; a very good illustration of the advantages of legal journalism. Our contemporary, has also (Nov. 15) an elaborate and able article on that head of the law of carriers, which relates to their power of limiting their liability by tickets, and especially with reference to the passes given to drovers of cattle. Our contemporary arrives at a conclusion in which we heartily concur, that the Railway Traffic Act, 1854, was substantially a return to the principle of the common law, as in reality, there is no assent to the term of the tickets, there being no real power of dissent, or that they ought to have no legal operation or effect beyond what is legally reasonable, and would be implied by law without any express stipulation, where the street obligation of common carriers does not apply. Our contemporary has an article on International law, especially with reference to the recent efforts of publicity and jurists at Ghent and at Brussels, on behalf of an international code and of arbitration, and the labours of Dudley Field. It observes, though not very sanguine as to results:—

"We are far from saying or believing that no good results are likely to flow from these movements of the jurists. The literature of the law of nations is exceedingly obscure and undefined. Juridical science can undoubtedly do much to clear it up. There are many points now in doubt that all governments would be glad to have settled on any fair basis. Among these are questions of domicile, of allegiance, of maritime collision, of blockade, of disposition by will, &c. Probably, also, much can be done toward inducing civilized countries to adopt some common method of dealing with such questions as shipping, railways, telegraphs, postal service, copyright, patents, money and the

like. This would be a great gain for justice and peace. These conferences of the jurists can initiate a movement which may, as Count Sclopis said, 'make the voice of public opinion ring in the ears of the governments, and so create what Montesquies terms a common feeling. This will result in their deciding to do something positive.' But it is chimerical to expect that a Code or Arbitration can be made obligatory on nations."

Our contemporary has an admirable article on Blackstone and our critics, and which we cordially concur in his view of the great commentator, supported as it is by the opinion of Mansfield and Bentham, and by such eminent men as Sir William Jones, Chancellor Kent, and Lord Campbell. Alluding to the shallow idea that his law is now obsolete, our contemporary makes an excellent observation:—"The student of law should always bear in mind that the obsolete may be quite as important to him as the active. Every lawyer should seek not only to know the law, but the reason of the law, and the reason is frequently to be found only in that which has gone into disuse."

This reminds us of a passage from Meyer's "Institution Judiciaries," in which it is observed that the English law is so ancient in its origin that it cannot really be understood without the study of its history. Our contemporary as an excellent article (No. 22) on the "Study of Law as a mental discipline," which we did not see until we had written our opening article, but which on some points takes a similar view and supports it by one or two of the authorities we had cited. It is curious and interesting, and one of the advantages of legal journalism to observe this concurrence of opinions and ideas in the minds of members of the profession far distant, but thinking on the same subject in entire harmony in consequence of their having imbibed from the same sources the works and writings of our greatest thinkers, the same spirit and the same general principles, and pursuing, it may be added, the same object—the advancement of the study of the law as a science, the elevation and improvement of its practice as a profession. Our contemporary alludes to an article in the *Law Magazine*, with reference to the influence on the mind of the study of law, and entirely agrees in our general conclusion, on the necessity for enlarging the mind by other studies, especially metaphysics or mental philosophy. We venture to add, moral philosophy, and especially moral theology; for we are of the opinion of old Bacton, that the only solid and enduring basis for law is natural justice.

THE LAW MAGAZINE AND REVIEW.

No. III.—VOL. III.—MARCH, 1874.

I.—MICHAELMAS TERM AND SITTINGS.

WE continue and conclude our review of the business in all the Courts during last Michaelmas Term and Sittings. Resuming our review of the business in the Courts of Common Law, in the course of the Term more than one of those cases arose which touch upon the province of international law. Thus, the charterer of a ship having had his attached in the District Court at Philadelphia, until the master, to release her, paid a sum of money; the owner sued the charterer here for damages, but the Court held the action not maintainable as the seizure of the ship was the act of the American Court, and though it was put in motion by the defendant, that did not render him liable, as the Court had jurisdiction, and it did not appear that there was an utter absence of reasonable cause, the plaintiff not having appeared or appealed. (*Taylor v. Ford*, Queen's Bench). In another case a ship chandler at Quebec sued a shipowner at Liverpool for necessities supplied to the ship, on the order of the captain, who had ample funds, but had misappropriated them. The jury found that the plaintiff did not know what was the fact, that the owner had an agent at Quebec, but might have ascertained it on enquiry; and they found for the plaintiff, the things supplied being necessities. The verdict was assailed for misdirection in leaving that to them as the question, and also on the ground that it was against evidence, and a rule

nisi was granted; so that the question will not be decided for some time. (*Gunn v. Roberts*, Common Pleas.)

One of the cases heard this Term, in the Queen's Bench raised a curious question. A stable in which horses stood at livery was blown down by a violent storm of wind; but, in consequence, as was alleged of unsufficient construction, and the owner of a carriage at livery, which was injured, sued the livery stable-keeper for the damage. The judge at the trial directed a nonsuit, holding that if any one was liable, it was the builder, there being no evidence of personal negligence on the owner. The question was argued and the court took time to consider their judgment, although it was held a few years ago in the Exchequer that in such a case the builder is liable to a stranger, (*Butler v. Hunter*, 7 H. and N. 8, 21.,) and not the owner, so that unless the fact that the owner was bailee for hire makes a difference, the question has already been decided. (*Searle v. Laverick*. It has been held, however, by a court of error, that where a person receives here a reward for admission to a building, he warrants its safety. (*Francis v. Cockerell* 7 B and S, 950, 39 L J., Q. B. 291.)

At the end of the Term an important point came before two judges of the court, sitting in a second division, (Mr. Justice Lush and Mr. Justice Archibald) illustrating the difficulties created by complexity of jurisdictions created under various statutes. The Admiralty Jurisdiction Act, 1861, giving an enlarged jurisdiction to the court as to ships, whether the cause of suit arose on the high seas or not restricted, applied only to vessels propelled by oars.* The subsequent court, which conferred an Admiralty jurisdiction, as the County Courts did not contain such restrictive words, and thus questions appeared to give the inferior courts—whence an appeal in Admiralty cases lay to the Admiralty—jurisdiction in some classes of cases in which the superior court would not have jurisdiction. The Privy Council, however, on appeal, held, contrary to the Common Pleas, that the statute had created this anomaly, and now the question arose in this

court. An action had been brought to recover for damage done to a ship by a barge, on the river Thames, within the boundary of a county, so that the Admiralty would have no jurisdiction, not at Common Law, for it was not at sea, nor by the Admiralty Act, for it was not damage done by a ship. Nevertheless it was contended that the action ought to have been brought in the County Court, as it clearly might have been, since the County Court had evidently jurisdiction, and that by the Act of 1861, might be exercised *in personam* as well as in *rem*. The argument of Mr. R. E. Webster to that effect, therefore, prevailed over the argument of Mr. Phillimore, and so the court decided. (*Flower v. Purkiss*).

An important point of constitutional law arose in the Court of Queen's Bench in an action for an alleged infringement of patent for the making of arms, in which the defendants pleaded that they were making the arms at the command of the Crown, against whom the patent right could not be enforced, and under a contract with the Secretary of State for War. The plaintiff applied at Chambers before Baron Martin for an inspection of the contract, which the defendants objected to disclose on the ground that public policy precluded a discovery of contracts with the Crown for the public service. The plaintiff applied to the Court, and the Attorney-General appeared on the part of the Crown, and supported the objection, on the ground that the Secretary of State was privileged to refuse to allow a document to be produced on the ground of public policy, even without showing that in point of fact it would be prejudicial to the public interest to disclose it. The Court appeared to doubt whether this ought not to be shewn, and took time to consider their judgment, giving the Attorney-General leave to file an affidavit on the point if he thought proper. He did not do so, and eventually waived the objection in the particular case, but reserved his right to insist upon it on any future occasion. (*Dixon v. The London Small Arms Company*.) [See *Home v. Lord G. Bentinck*, Queen's Bench, re-affirmed in the Court of Error in *Dickson v. Lord Paulet*.]

The first case of any importance which came before the Court of Common Pleas, after the new Lord Chief Justice had taken his seat, was one which strongly illustrated the value of a chief able to take an enlarged and comprehensive view of legal subjects, rather in harmony with the spirit of modern legislation and the dictates of reason, than the mere letter of narrow rules of law. It was an application on the part of the French Government for an order to examine witnesses whose depositions were required in a criminal trial in France. The application was under the Extradition Act of 1870, which extended to criminal proceedings, not of a political character; the provisions of the Act of 1856, enabling evidence to be taken here in civil actions abroad, just as under the Act of William IV. examinations may be taken abroad in such actions in this country. And, of course, in such cases the accused is necessarily abroad; and, further, the Extradition Act of last year provided that the Secretary of State may order the examination of witnesses for the purpose of a criminal trial abroad, even in the absence of the person charged, although of course in extradition cases the accused person is always in this country. Yet Mr. Justice Denman at chambers hesitated to make the order, his difficulty being that the former Act, under which the application was made, did not expressly provide that the examination could be in the absence of the accused, (as if it could ever be otherwise). Nevertheless, when the matter came before the court composed of that learned judge, with Mr. Justice Keating, Mr. Justice Brett, and Mr. Justice Grove, they appeared unable to get over the difficulty concerning it contrary to "a fundamental rule of English law" to take evidence in the absence of the accused. Even if it were so, still as Sir John Karslake pointed out; the statute was plain, and moreover the court were not called upon to sanction the use of the depositions as evidence on any English trial, and the rule of law referred to any applies to English trials, and the trial of English subject, and has no reference to the trials of foreigners in foreign countries. Nevertheless, the court could not see their

way to making the order until a day or two afterwards, when the new Lord Chief Justice took his seat, and he at once saw that by the scope of the statute, the matter was free from doubt; he pointed out there could be no necessity for an express position that the examination might be taken in the absence of the accused, as an extradition case. Since, otherwise, the statute would have no application at all. Since the accused, against whom the examinations are to be taken, is always of course abroad. (*In re Ferrand*.)

One of the cases heard this Term in the Common Pleas raised the vexed question as to the effect of a supposed usage of the Stock Exchange to allow a jobber of shares to transfer them to a party who is really fictitious, which would be equally contrary to justice and legal principle, and contrary to the opinions of the judges in Law and Equity. In the present case the jury found that there was no such usage or fact. The judge, Mr. Justice Brett, approved of the finding, and directed the verdict for the plaintiff, which this court upheld. (*Dent v. Nickalls*, Common Pleas). There was afterwards a decision of the Vice-Chancellor, in a case arising out of the same transaction to the same effect, already mentioned *Vide ante*.

In an action against the *Times*, tried before the late Lord Chief Justice, the question was raised whether the court can determine in an action for libel that there is not a libel without its being left to the jury. It is of course understood that the Court cannot decide that there is a libel without the verdict of a jury, but it appears that it is otherwise if it appears to the Court, on the face of the publication, that it cannot be a libel. The *Times* had published of the plaintiff that he was not a captain in the Artillery, and that he was "erroneously described" to be. It was suggested that this meant that he was an impostor, and had falsely represented himself as a captain in the Artillery. The late Lord Chief Justice held that there was nothing to sustain the action, and directed a non-suit, reserving the question of law whether he was right. Three

Judges, Justices Keating, Brett, and Grove held that he was, and refused even to entertain the question by granting a rule. Had there been any doubt, they said, as to the meaning of the words used the case should have gone to the jury, but they were not reasonably capable of sustaining the meaning suggested. There was, therefore, nothing to leave to the jury. (*Hunt v. Goodlake*). This decision, which corresponds with one in the Exchequer, may be taken to overrule the "Bag of Bags" case, in which Mr. Justice Mellor, contrary to the opinion of Mr. Justice Lush, held that it ought to go to the jury whether it was a libel to say it was a foolish description to give of a bag! So in another case when the question was as to whether words were defamatory and actionable, there was a rule nisi, and the case is pending. (*Miller v. Decond*). In an action of slander, the question being whether the words were defamatory, the Court of Exchequer apparently took the same view as the Court of Common Pleas, that they had to decide whether the words were such as could not be defamatory. The action was against Mr. Leeman, M.P., for words spoken in a speech at a railway company's meeting, in reply to one by the plaintiff, reflecting on the conduct of the plaintiff, on the issue of debentures. The jury found that the issue of the debentures were unjustifiable, but that there was no intention to defraud, and they gave merely nominal damages. The question was reserved whether the speaking the words, assuming them to be defamatory, was not protected, and Sir John Karslake obtained a rule to raise that question, and also on the ground that the words were not defamatory in their nature as they did not impute an indictable offence. (*Jackson v. Leeman*.)

In the course of the Term there were some few points of law decided as to the law of husband and wife, of which one was this: that where a husband and wife are living apart, under a separation deed, he making her an allowance, it is not necessary for the husband in order to relieve himself from future liability to the tradesmen, with whom she may have

dealt on cash, to give notice to them of the separation, though it might be necessary if she had dealt with his authority or credit. (*Coulter v. Biddick.*)

In the course of the Term, a case arose in the Exchequer, which raised the old and oft recurring question whether a provision in an agreement that the party, upon treating it, shall pay such a sum as shall be found due after arbitration, is invalid, according to what Lord Campbell, in the House of Lords, truly called the "preposterous notion" that agreements for references of disputes to arbitration are still, in spite of repeated statutes to encourage and enforce them, "contrary to the policy of the law." The Court, not without hesitation on the part of Baron Bramwell, adopted the subtle and absurd distinction drawn in *Scott v. Avery*, and held it good as a condition precedent to a right of action, not as a reference to arbitration. (*Dawson v. Lord Fitzgerald.*)

In the Court of Exchequer another point was decided bearing upon the law of husband and wife, especially with reference to separation. A wife separated from her husband was assaulted by him, and she employed attorneys to prosecute a suit for judicial separation, which ended in a separation by deed, and for the costs the attorneys sued the husband and recovered, the jury finding that he had been guilty of legal cruelty, and the court upholding the verdict, holding that the wife had taken steps necessary for her protection rendered necessary by the husband's misconduct, and that, therefore, she had an implied authority to pledge his credit for reasonable expenses. (*Stocken v. Patrick.*) A curious point arose in an action on a separation deed in which the husband covenanted to "pay so long as they should be apart." There was a decree for dissolution of the marriage on the ground of adultery by the wife during the separation. But on demurrer, the court held this no bar to the action. (*Charlesworth v. Holt, Ex Sedgacre*) for was not the covenant in consideration of the *status* of marriage dissolved through the fault of the wife? In another case, where a man had agreed to pay a woman an annuity so long as she should maintain

his children by her, it was held not within the statute of frauds, as a contract not to be performed within a year because he was at liberty to terminate it at pleasure. (*Knowlman v. Brett*). This also has been doubted and discussed in the pages of our contemporary, the *Law Journal*.

Another case also came before the Court of Exchequer which illustrates the absurdity and inconsistency of our local courts of jurisdiction. It was a case from the Passage Court of Liverpool, one of those Borough Courts, which, like the Mayor's Court, in London, and the Tolsey, in Bristol, and the Court of Exeter, is not limited in jurisdiction by amount. The point of law which arose was one under the Carriers Act, which might involve a question of hundreds of pounds, as to the nature of articles which require to be declared under the Act. The court thought that it meant articles made up, and not mere materials, but that the application of the phrase was for the jury (*Payne v. The London and North Western Railway Company*). There was a case from the Mayor's Court, London, which afforded another similar illustration. Here the amount was only for £7, but raised a question of some novelty and difficulty (as to the validity of contracts for the exchange of votes for charities) on which the court took time for consideration. (*Bolton v. Maddan*, Queen's Bench, November 25th). The question would not have been more difficult for trial had it involved £7,000 instead of £7, and after all had it been tried in a superior court, the question of law would not have been decided at the trial, but would have been reserved.

Another case in the Exchequer illustrated the absurdity of the limitation of County Court jurisdiction by pecuniary amount. It was an action in the Supreme Court, ordered to be tried in the County Court, where there was a verdict for the plaintiff for £12. There was then a motion in the Supreme Court to increase the amount of the verdict to £22, and on the other side there was a motion to set aside the verdict altogether, and enter it for the defendant. The question entirely turned upon a point of law of some im-

portance; and apparently of some difficulty, as four counsel were heard upon it, before a court of four judges. The question was whether a Local Board could charge for the expenses of its fire-engines when used within its district. In the result, the court held that it could not, a decision of universal application. Yet the case came, in respect of amount, within the jurisdiction of the County Court, and it was clear that the facts could be as well ascertained there as in the Superior court, for the Superior court had sent it there for trial. And had it been sent there, the question could as well have been raised by appeal, and at far less expense. Hence it is manifest that had it involved £1,200 instead of £12, the suit might just as well have been brought in the County Court. (*Local Board of Bridlington v. Bower.*)

COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

This Court sat several times during Term, on the 15th and 22nd November. At the first sitting before the Lord Chief Baron, Mr. Justice Blackburn, Mr. Justice Lush, Mr. Baron Pollock, and Mr. Justice Honyman, three cases were heard. One was reserved by Mr. Justice Honyman from the Central Criminal Court, and a question whether a letter to a broker enclosing a cheque "for payment of bonds" he had purchased amounted to a "written direction" for application of the cheque in payment, rendering him liable under the 24 Vict. 196, 375, for the misapplication of the money. The judges held that it clearly was so, and affirmed the conviction. (*The Queen v. Christian.*) Then there was a case of larceny by trick (*Queen v. Turp*), and a case as to the liability to repair a county bridge (*Queen v. Kitchener*). At the second sitting before the Lord Chief Baron, Mr. Justice Blackburn, Mr. Justice Lush, Mr. Justice Grove, and Mr. Baron Pollock, there were two cases, one raised a question whether an entry in the registry of births, coupled with the evidence of the girl's grandmother, that the child's name corresponded with the registry, was sufficient evidence of the age of a girl an indictment for an assault upon her being under 12. The Court held that it was. (*Queen v. Weaver*) In the other

case the Court held that a prisoner, however, could not be convicted of larceny under a count for receiving. (*Queen v. Coggins*.)

COURT OF ERROR.—At the end of Term the Courts of Error sat as usual for twelve days; the judges of two of the courts constituting themselves, in turn, courts of error for cases from the other court, so that a court of error for cases from such court sat about three days. Thus in the first instance, a court of error for cases from the Court of Queen's Bench was constituted of Sir J. Coleridge, Mr. Baron Bramwell, Mr. Justice Keating, Mr. Baron Cleasby, Mr. Justice Grove, Mr. Justice Denman, and Mr. Baron Pollock. One of the first cases heard illustrated the absurdity of the system. It raised a question under the Bill of Sales Act as to the validity of bills of sale given on renewal of each other within the period of 21 days, and within which registration is required. The Court of Common Pleas had lately held them valid. (*Small v. Bun.*) The Court of Queen's Bench, though in some hesitation, followed the decision, and now the question came before a Court chiefly composed of Common Pleas Judges, whether the decision in their court was right. The Court determined—not without hesitation on the part of one of the other judges—that in accordance with the decision of the Common Pleas, and no doubt upon grounds simply sufficient; nor can any one question the soundness of their decision. But still no one can fail to see that for the exercise of an appellate jurisdiction such a constitution of the tribunal is far from satisfactory. (*Ramsden v. Scepton*, Nov. 27.) From want of judges it was found impossible to form a Court of Error for cases from the Common Pleas and the Exchequer, and therefore a Court of Error only sat for three days for cases from the Queen's Bench.

In two other cases the judgment of the Queen's Bench was affirmed. One was on the construction of a charter party (*Merchant Shipping Company v. Armitage*); another was as to the authority of a railway inspector to incur expenses for necessary assistance to persons injured in an

accident on his line. (*Langton v. The Great Western Railway Company.*)

NISI PRIUS SITTINGS.—These sittings were going on at short intervals during Term in each of the three courts before a single judge, and after Term for the statutory periods of twelve days at Westminster, and the same period at Guildhall before one or two judges in each of the courts, at least so far as was consistent with the other demands on the judges, as the Tichborne case, and the Winter Assizes. The Court of Queen's Bench, indeed, from the first could only have one court of *Nisi Prius*, and had to borrow a Baron for the purpose, three judges being absorbed in the Tichborne case, and the other three being required *in Banco*. Baron Piggott or Baron Pollock, therefore, sat during Term. At the first sittings in Term there were 37 cases for trial, of which 25 were remanets from last Term. They were as usual during Term common jury cases and were only fit for inferior courts. For instance, there was a breach of promise of marriage case, damages £80 : an action for a £50 reward ; an action on a bill of exchange, really without defence and so on, and Mr. Justice Quain tried an action for the being bitten by the defendant's dog, damages £80.

In the Common Pleas, where Mr. Justice Honeyman and Mr. Justice Grove sat alternately, there were 13 cases at the first sitting, 11 for the second, and 34 for the third—altogether 58. In the Exchequer, where Baron Cleasby sat, there were 40 cases for the first sitting in Term, of which 13 were remanets, 20 for the second, and 51 for the third—altogether 84. The cases were of the same character, in one case for wrong dismissal of a servant, damages, £30 ; a breach of promise of marriage case, damages £25 ; a false imprisonment case, damages £20 ; a seduction case, damages £30 ; commission on the sale of a house, £51.

At the sittings after Term, in Westminster, in the Common Pleas, there were 97 cases, of which 42 were remanets, 42 were special juries, 35 common jury cases. Mr. Justice Brett sat, and Mr. Justice Honeyman also sat to assist the

Lord Justice. In the Exchequer the cause list contained the names of 100 cases. In the Queen's Bench there was a similar number of cases.

The common jury cases were of the same character, these were railway or omnibus accident cases, false imprisonment, slander, and seduction, verdicts from £5 to £15 or £20, or, perhaps, £30, £40, or £50. In many cases it was found, as Lord Chief Justice Coleridge said, in one of the first cases he tried, "that the verdict would not be conclusive, as there were points of law to be raised," and the facts were not in dispute, so they were reserved for the Court. One day, in the same Court, three cases were disposed of without trial, and only a portion were tried out. In one case Mr. Justice Brett observed, "that it was an important action." In another Mr. Justice Honyman said "he should never forget the speech of the defendant's counsel to his dying day."

At the sittings at Guildhall the character of the common jury cases was similar, but the special jury cases were more of a commercial character, and a large portion of them became remanets.

WINTER CIRCUITS.—There were several Winter circuits: Durham, Liverpool, Manchester, Mr. Justice Quain, Mr. Justice Honyman, and Mr. Baron Pollock; Western and Oxford: Mr. Justice Keating and Mr. Justice Archibald; Home—Essex, Sussex, Surrey, and Kent—Mr. Baron Piggott, Gloucester and Staffordshire, Worcester. There were very few cases of murder, and rarely more than one or two at a place, and all the rest were cases which might well have been tried by good recorders or chairmen of Quarter Sessions, and then one judge instead of five or six would have sufficed for the business. Thus, at Stafford there was one case of murder, two of manslaughter, three of highway robbery, one of bigamy, one of arson, one of forgery, one of larceny. So, at Taunton, there were fifteen persons, of whom, though three were charged with murder, there were only bills for manslaughter, and the rest were offences of a minor character.

On the Northern Circuit, the business, civil and criminal, was very heavy, and three judges were required to discharge it; but much of their time was taken up with minor business fit for inferior judges. As it was six judges were fully occupied through the month of December.

THE COURT OF ADMIRALTY.—The first case which came before the Court last Term was one of great interest, the case of the *Murillo*, a Spanish ship, which ran down the *Northfleet* and caused the loss of all on board, under circumstances of great atrocity. The case illustrated remarkably the efficacy of the process of the courts to enforce its jurisdiction. The Courts of Admiralty of any country can exercise its jurisdiction on any ship whatever its nationality in the locality of the injury, because the jurisdiction of the courts extends any where on the high seas, and is, in that respect, international, not unsuccessful in its character, and because its process is *in rem*, i.e., is exercised against the ship itself, so that the ships coming within a port in the power of the court is sufficient to ground the jurisdiction of the very use of the vessel itself is the process by which it is exercised. Hence when the *Murillo* came into the port of London she was at once seized and sued. The owners did not appear to defend, knowing the case defenceless. The Court ordered her to be condemned for damage and sold.

In the next case, which was defended and heard as usual before the Judge and the Trinity Masters, the collision occurred in the Downs, between a Russian bark and a German brig, both being at anchor. The German brig's anchor gave way, and drove upon the Russian bark. The Court decided in favour of the Russian bark that the German brig was solely to blame for the collision, and decreed accordingly. (*Gustave Fuohurst*, Nov. 5.) In another case, which took three days, a Calcutta steamer parted her cable in the Mersey, and drifted against and sank another steamer. The Court held that the pilot on board was alone to blame for the collision, and that therefore the owners were exempt from liability. (*The City of Cambridge*, Nov. 18, 19, 20.)

The law upon that head will be found in *Luce v. Ingram*, 6 M. and W. But in the early part of the year it was held that there may be cases in which the captain may be responsible. The exemption of the owners rests upon the statutory obligation to take a pilot on board and obey his orders.

Several cases of salvage occurred, and it is to be observed that this class of cases are heard before the judge alone without the Trinity Masters, although it might be supposed that they required more than other cases the assistance of nautical assessors, since the amount of the salvage must turn chiefly on the risk incurred, and it is hardly possible for anyone but a mariner to understand the degree of risk. It is only with reference to this element that the great apparent disparity in the sums awarded can be understood, a disparity far beyond the mere difference, the amount of service rendered. Thus, in the first salvage case heard last Term, a Norwegian barque, saved in the North seas, with her main mast gone, and the wind blowing strong, and a heavy sea running, a fishing smack took her crew on board and lay by her all night, and next morning this, with two other smacks, took her in tow, and after two days brought her into Grimsby. The net value of the property saved was under £1,000, the salvage awarded was £400, evidently on account of the risk. (*The Washington*, November 6th). In another case a steamer broke her propeller in the English Channel, and was towed by another steamer, next day to Portland Roads. The service lasted 16 hours. The value of the property saved was £20,000, the salvage awarded was £650, a comparatively small sum, evidently because the risk was not great. (*The Mary*).

In the course of the Term, a case occurred under the extended jurisdiction of the Court which now approaches to that of a mercantile tribunal, and includes cases of breach of contracts by shipowners. This was a case of what is called "damage to cargo"—that is, it was a suit by a merchant firm, who had shipped goods on board, for damage done to

the cargo in the course of the voyage, through want of care. The judge sits to hear these cases, as all cases of salvage, with two Trinity Masters as nautical assessors. The evidence, however, was insufficient to satisfy the judge of the damage resulting from negligence, and he dismissed the suit. (*The Prospermo*, Nov. 14.)

In another salvage case: an English steamer 120 miles from the Lizard was disabled, and a Russian steamer towed her all day towards Falmouth, where with that aid she got next morning. The value of the Russian ship and cargo was £75,000, the value of the English steamer with her freight was £13,000. The Court awarded £300 salvage. Here the service was not great, and the risk was inconsiderable, although the values were large, hence the salvage allowed was comparatively small.

COURT OF PROBATE, DIVORCE, AND MATRIMONY. — This court exhibits the anomaly of courts, each with enormous business, and with only one judge between them, the result of which is that, as of course he can only sit in one of them at a time, one of them must necessarily be closed while he is sitting in the other. When Sir J. Hannen sat for the first time last Michaelmas Term, there was a total of 185 cases in the Divorce Court, 14 of which were suits for judicial separations, 6 for restitution of conjugal rights, 3 for nullity, and the rest for divorce. There were 127 causes down for trial by the court without juries, 81 of which were undefended and 46 defended: 34 causes were down for trial by special and 20 by common juries. There were also 4 appeal cases to be heard before the full court. In the Probate list there were 11 causes down for trial by the court itself, 18 by special, and 13 by common juries. There were also fifteen causes standing over by consent of parties. The learned judge began by sitting or taking probate cases to be tried by himself alone without a jury. One of the first cases tried was remarkable, the will being propounded nearly twenty years after the death of the testator. His widow took possession of the property and did not prove the will. After

her death a copy was propounded, and though it was opposed by the heir at law, the judge found it proved and pronounced for the copy. (*Slater v. Scattergood*).

The next case was curious : two wills were executed on two successive days, the testator dying on the 5th the day after the second. After hearing the evidence of the witness who had prepared the will of the 4th December, the court came to the conclusion that it could not be supported, as the testator was evidently unable to understand what he was doing at the time of its execution. The court, therefore, pronounced for the will of the 3rd of December, but allowed costs out of the estate. (*Murrey v. Murrey*).

After sitting four days in the Probate Court, Sir James Hannen sat for nearly the rest of the Term in the Divorce Court, and tried a number of cases by himself, without a jury. In the first day he tried nine cases, in all of which conditional decrees of divorce were granted ; in four of them against husbands for cruelty and adultery, and the other five against wives for adultery ; 50 on most days for the remainder of Term, there were several similar cases, on one day eight, the proof in each taking a short time. In more than one case the Attorney-General, on behalf of the Queen's Proctor, intervened to prevent suspected collusion. In one case, in which there had been two unsuccessful petitions by the applicant, and then a demand for cohabitation, the Attorney-General said the Queen's Proctor had intervened for the purpose of having the facts as to the previous suits fully laid before the Court, but seeing no reason to doubt the *bona fides* of the petitioner's offer to resume cohabitation, he should not oppose the decree.—Decree *nisi*. (*Fitzgerald v. Fitzgerald*.)

In another case, in which the Queen's Proctor intervened, it appeared that the petitioner himself had been *impare delictæ*, and the petition was dismissed. (*Harper v. Harper*.) In one case the petition failed because the marriage was invalidated by false names. The petitioner married the respondent, who was a farmer in Monmouthshire, in May, 1870, and she now

prayed for a dissolution of marriage, on the grounds of his adultery and desertion. It appeared, however, that the marriage was by banns, and that there was no due publication, false names having been used with the knowledge and consent of both parties. The marriage was, therefore, invalid. The petition for dissolution was consequently dismissed. (*Anthony v. Anthony*). In one case a husband sued for a restitution of conjugal rights not with a view to enforce cohabitation, but to vindicate his character from supposed aspersions by his wife, which were withdrawn. (*Steel v. Steel*).

Another case was one of great doubt and difficulty on account of the attesting witnesses denying the execution, as in the Matlock will case, which went to the Lords and was tried three times. The learned judge on account of the difficulty of the case would have preferred that it would have been tried by a jury, and it very well illustrates the class of cases which require such a mode of trial; but as the result he pronounced against the will, as he was not satisfied of it. (*Gibbins v. Long*.)

In another case, although a will had been destroyed under peculiar circumstances, yet as there was no doubt as to the facts, there appeared no necessity for a jury, and the judge, being satisfied with the evidence, pronounced for the draught of the will, which was propounded. (*Harvey v. Peck*.)

Towards the end of Term the judge sat in Divorce cases, with juries, and in one case the Queen's Proctor intervened, and alleged adultery against a wife who had obtained a decree *Nisi* for the dissolution of her marriage, on the ground of cruelty and adultery. The evidence was contradictory, and required a jury. The Judge Ordinary, in summing up, said it was obviously the duty of the Queen's Proctor to have the case thoroughly investigated when the statements of the witnesses who had been called were laid before him, and he was very glad, in a case where the evidence was so conflicting, to have the assistance of a jury. The jury found that the petitioner was not guilty of any of the acts of adultery charged. She will, therefore, be entitled to her decree absolute. (*Cooper v. Cooper*.)

In another of these cases damages were sued for the adultery, and £500 were given. (*Long v. Long*).

In the course of the Term an application was made in the long litigated case of Mrs. Godrich, with reference to the custody of a child. Dr. Swabey, on behalf of Mr. Godrich's father, moved for leave to intervene in this suit for the purpose of applying for an order for the custody of one child, who is at present, under an order of the Court, in Mrs. Godrich's custody. Mrs. Godrich in person opposed the motion. The Court took time to consider whether it had power to allow an intervention for such a purpose, after a decree of judicial separation, but ultimately granted the application for leave to intervene.

One day during the Term, the full Court for Divorce and Matrimonial causes sat for the hearing of appeals, constituted of the Judge Ordinary, Mr. Justice Grove, and Mr. Baron Pollock. In two cases there were applications for rehearing or for a new trial. The applicants not having presented themselves in the witness box at the trials, and at both cases the applications were refused, and in both cases the decision of the Judge Ordinary was upheld. In one case the co-respondent had been examined at the trial, but the respondent had not, and though they were not, it was stated, acting in concert, her explanation of her absence not being sufficient, and the judge being satisfied with the evidence, the Court refused the co-respondent a new trial, and *quasi* if they would have granted it even if had he not been satisfied. (*Chaldcott v. Chaldcott*.)

In the other case, in which the decree was against the husband, and he had not offered to be examined at the trial, and had not applied for an adjournment of the trial, and now only said that from illness and other causes he had not been prepared with his defence. It was not deemed sufficient explanation. (*Eyre v. Eyre*.)

In another case, the question was one of alimony; the wife had been living with an allowance, under a deed of separation, and now a suit being instituted against her, she

applied, for an increase of alimony, on the ground of this increase in her husband's income, but the application was refused. (*Powell v. Powell*).

In one case it was announced that Mr. Justice Grove and Baron Pollock were unable to attend in consequence of the pressure of business in the Common Law Courts; and the argument was adjourned until arrangements could be made for the attendance of two other Judges.

In the course of the Term there was a case under the Legitimacy Declaration Act. The petitioner prays for a declaration that the marriage of his mother was valid, notwithstanding a prior *de facto* marriage with another person, still living, on the ground that that former marriage was invalid—the person she was married to having himself a wife living. It appeared, however, that the petitioner's domicile was Australian, and that there was no property in England which would be affected by the decree the Court had no jurisdiction to entertain the suit under the Legitimacy Act. It was then prayed to declare the nullity of the former marriage of the petitioner's mother, and as to this the Court took evidence, and reserved the question whether it could declare the nullity.

II.—THE REGULATION OF RAILWAYS ACT, 1873.

(36 and 37 Vict., cap. 48.)

A VERY important Act of Parliament came into force upon the 1st of September last, and very few people know anything about it. That Act created a new tribunal in our midst, constituted in a way that no other English tribunal has up to the present time been constituted, and gave that new Court very large powers with the view of protecting the interests of the public; and yet the public seem to care very little about the whole matter. There is,

as most lawyers know, an immense mass of Railway Legislation. Act after Act has been passed, and still there is necessity for further legislation in Railway matters. It may scarcely be remembered now that when railways were first sanctioned by Parliament, and constructed under that sanction, the idea was that the Railway Company would be owner of the way, and receive payment from those who used it. Such was actually the relation of Canal Companies, at that time, to the canals of which they were the owners. Soon, however, it was discovered that such a use of railways would be inconsistent with safety or convenience, and hence, although railway companies were, and still are, bound to admit the carriages and engines of other persons on their lines, they were authorised to use their own engines and carriages. Here, then, we had companies who had, through the assistance of legislation, been enabled to construct a line of railway on which they became carriers of goods and passengers, at least to long distances, at such a rate and with such convenience that they distanced all competition—from which too they they were protected by the legislature which in granting permission to make a railway from a certain place to a certain place would have hesitated, and rightly, if informed that there was already a line of communication between them, and who consequently to all intents and purposes became monopolists.

Very few people, now-a-days, cling to the belief that monopolies are good things for the public generally, but most political economists have held that they were possibly justified, when a ruler or government was convinced that a country was well-suited for a certain industry, and when, but for the protection afforded by a monopoly, such industry would not take root. Now, the fact that a Railway Company in order to prosecute its design must obtain the sanction of Parliament, and that to carry it out it required an immense aggregation of capital, and further that it thereby became the exclusive carrier of the traffic of a certain district, put very great powers in the hands of the

company, and as the interest of the company and the interests of the public were not the same, it became necessary to counteract the effect of this practical monopoly, which was calculated to be highly prejudicial to the community, and might be made tyrannously oppressive to individuals. It is the policy of the law to protect the weak, and hence the attempts which have been made to limit the railway monopoly.

From about the year 1842 it became the usual practice to insert in the several Railway Acts certain clauses, which provided that the same tolls should be charged to all persons equally under the same circumstances. These clauses were called "equality clauses," and there is one instance in the reports in which, under the 7 and 8 Vict. c. 85—which was the Act that provided for the future purchase of railways by the State—(by which the Board of Trade was authorized, when of opinion that it was for the public advantage, to proceed against Railway Companies contravening the provisions of any Act relative to railways,) proceedings were taken against a Company for an alleged infringement of one of the clauses.*

In 1845 the equality clause was made applicable to all Railways by the Railway Clauses Consolidation Act,† and in the same year two important Acts of Parliament were passed with reference to Canal Companies. It has always been a theory of the legislature that the monopoly of Railway Companies might be most advantageously checked by the encouragement of competition upon the part of canals. For the conveyance of heavy goods canals are in many ways better suited than railways, and it seemed probable to the law makers that a little encouragement of canal companies might bring about competition which would be for the advantage of the public. But self-interest had keener eyes than the Argus-eyed legislative assembly, and the Railway

* *Attorney-General v. Birmingham and Derby Junction Railway Company.* 2, R. Cas. 124.

† 8 and 9 Vict. c. 20, s. 90.

Companies, having foreseen the possibility of such competition, at least in the case of long through transits for heavy goods, had bought up important links in the canal system and upon their own parts of the canal exacted so much, in the shape of "bar tolls," that the competition which would have been so beneficial could not take place. Doubtless the principle that it is better to put an end to a monopoly by means of the agency of public enterprise instead of by legislative enactment, was wise and excellent.

One of the evils of our present system, by which we have a large body of men who devote themselves to the business of legislation, is over legislation. That evil of a hypocritical nation ought, wherever it is practical, to be avoided. The country that has fewest laws has least need of laws. But while the idea of the strengthening the hands of canal companies, in their contest with railway companies, was excellent; it came too late. There is not much use in making a man strong to fight when his antagonist has got him in irons. These two Acts, therefore, the one which empowered canal companies to vary their tolls, provided they made the same charges to all persons alike under the same circumstances,* and the other which empowered canal companies (until that time only the owners of the canals and wharfs) to purchase boats and barges, to become carriers of goods, and to enter into working arrangements with other canal companies,† came too late. Still, tracing the history of railway legislation, we find that a Commission, consisting of five Commissioners existed from the year 1836 to the year 1851. That commission exercised all the power of the Board of Trade with reference to railways, and the Commissioners had the further duty of reporting upon private Railway Bills.

A Select Committee of the House of Commons was appointed in 1853, of which Mr. Cardwell was chairman; and it was upon the reports (5 in number) of that committee that the Railway and Canal Traffic Act of 1854 was founded.

* 8 and 9 Vict. c. 28.

† 8 and 9 Vict., c. 42.

The legislature had by that time discovered that the indirect method of putting an end to railway monopoly was ineffectual, and that some direct parliamentary interference, for the benefit of the public, was peremptorily called for. That Act provided that every Railway and Canal Company should afford "reasonable" facilities for forwarding both its own and through traffic, and that this should be done without giving any "unreasonable" preference to one person above another. The remedy, in case a company did not give reasonable facilities or did give undue preference, was to be by means of an application to the Courts of Common Pleas in England or Ireland, and to the Court of Sessions in Scotland. We have always heard that the Court of Common Pleas was selected because the judges of the Courts of Queen's Bench and Exchequer refused to have anything to do with it, and that had Chief Justice Jervis consulted the puisne judges of his own court before communicating with the Government, the Court of Common Pleas, also, would have expressed unwillingness to have anything to do with the jurisdiction.

The terms in which the Act was spoken of makes this more than probable. Lord Campbell protested against such duties being imposed on the judges. "The code," he said, "was not one which the judges could interpret, it left them altogether to exercise their discretion as to what was reasonable with no statutory or common law authority to guide them." Lord Lyndhurst, too, said, "that the questions that would arise under the Act were so vague and so incapable of being reduced to fixed rules that it was impossible conflicting decisions should not be given;" and Mr. Justice Cresswell, in one of the cases which afterwards came before the Court of Common Pleas, remarked that the questions under the Act (17 and 18 Vict. c. 31) "assume a very difficult and complicated character, and are such as we feel but little qualified to decide. Nevertheless, as the legislature has thought fit to impose on the judges of this Court the duty of dealing with such questions, we must do so to the best of our

ability, whenever it becomes necessary." * Others complained that the Act contained no canon of construction. However, such as it was, the Court had to do the best they could with it, and, during the 18 years, twenty-five cases have been decided in the Court of Common Pleas in England, and four in the Court of Session in Scotland. Not that they have done a great deal with the Act, for an examination of the cases which have been decided in the courts will prove that the public became less confident of an efficient remedy, and therefore, that as time went on, the number of cases diminished, and it will also prove that the want of uniformity increased. Most of the cases arose out of allegations of unequal treatment, or, as it has been called, "undue preference;" and in only two was a question of reasonable facility brought before the Court.† Little doubt existed in anybody's mind that the result had justified the opinions of the learned judges who regarded the courts as incapable of discharging the duties which were imposed upon them by the Act, and it is not a matter for wonder that the Joint Select Committee, which sat in 1872 on Railway Companies Amalgamation, came to the conclusion that some change in the mode of the administration of the law was called for.‡ One thing, however, is to be noted in connection with the Railway and Canal Traffic Act of 1854, and that is that the Legislature had

* *Ransom v. the Eastern Counties Railway Co.*, 1 C.B., N. S. 452.

† In *re Caterham Railway Company v. London, Brighton, and South Coast Railway Company* (1 C.B., N.S. 410) the companies owning the main line charged the passengers travelling over the main line higher fares than they charged passengers travelling over branches of the same length belonging to themselves; and in the case of *re Barrett v. The Northern and Great Western Railway Company* (1 C.B., N.S. 423) it was held that to justify the interference of the Court to enforce the running of through trains on a continuous line of railway, it must be shown that the public convenience requires, and that it can reasonably be done. They will not interfere at the instance of an individual when there is a continuous line by which through tickets may be obtained, though by a somewhat longer route; no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation.

‡ See Report of the Committee.

despaired of effecting its object, with regard to the curtailment and limitation of the Railway Monopoly by means of competition, and had definitely adopted a different policy, which had been advocated by a Committee in 1844, of which Mr. Gladstone was chairman — viz.: regulation.* It had recognized the fact that the healthy processes of self-interest, competition, and the like, had failed to effect a cure of the disease which prejudicially affected the life of the community, and that it was time to exert a counteracting influence to those processes which jeopardised the comfort and convenience of the nation. We have seen that the intended remedy had not the desired effect, and it was with a view of rendering the provisions of the Act of 1854 more efficient, that the Regulations of Railways Act, 1873, was passed. But the Commissioners appointed under that Act have other duties to perform besides that of preventing undue preferences and of bringing about reasonable facilities, and it may be well to allude to these in this place before examining the main provisions of the statute.

In 1863, certain restrictions were imposed by the Railways Clauses Act, part iii, † upon working agreements which had not only to be advertised and to be sanctioned by the shareholders of the companies, proposing to combine for the purpose of traffic, but had to be approved by the Board of Trade, which had the power of considering objections to the proposed agreement which were brought before it. ‡ By that Act also, the provisions of the 1854 Act were extended to steam vessels worked by railway companies, § and the Board of Trade were entrusted with the duty of revision of the powers enjoyed and exercised by railway companies in relation to such steam vessels. By the regulation of Railways Act, 1873, || these powers and duties are transferred to the Railway Commissioners. Further, with the view of encour-

See 5th Report of the Committee of 1844.

† 26 and 27 Vict., c. 92.

‡ s.s. 22, 29.

§ s. 85.

|| s. 10.

raging the very feeble competition which canal companies are in a position to maintain against railway companies, the legislature has thought fit to make it obligatory upon all railway companies owning canals, that they should keep them in working condition, so that they may at all times be open to traffic,* and the same Act provides that no railway or canal company shall, without the approval of the railway commissioners, enter into any agreement by means of which a railway company can obtain any control over the traffic on a canal.† Again, the Commissioners may, upon the application of one of two differing railway companies, allow the disputants to refer the matters in difference to them for their decision, instead of referring them to arbitration,‡ and in any dispute to which a railway or canal company is a party, they may, upon the agreement of all the parties that the dispute should be referred to them, decide the differences.§ To them also differences arising between the Post Office and railway companies as to additional remuneration to be decided by arbitration under 1 and 2 Vict., c. 98, may, at the option of the companies, be referred.

It was necessary to refer to those provisions of the Statute that the reader might understand the whole scope of the enactment. It is evident, then, that the legislature is still struggling with this great practical law of monopoly, which has been enacted by the fate which is associated with the aggregation of great wealth, and by the various circumstances of railway construction. It is evident the Regulations of Railways Act, 1873, is another attempt upon the part of the legislature to grapple with that strange monster railway monopoly which has done so much to make legislation futile, and which will each day, as amalgamation and combination progress, become more powerful for evil to the wide interests of the people, and to the real benefits which the nation derives from its railway system. Will this Bill, too, prove useless?

The constitution of the new tribunal, which is called the

* The Regulation of Railways Act, 1873, s. 17. † s. 16. ‡ s. 8. § s. 9.

Railway Commission, and which was recommended by the Committee on the Amalgamation of Railway Companies in 1872, (upon whose report indeed the Regulation of Railways Act, 1873, is mainly founded) is, it seems to us, admirable. The various complaints which had been made by the judges themselves showed that a court of law was not the proper tribunal to decide upon cases under the Railway and Canal Traffic Act, and the Select Committee had come to the conclusion that the Board of Trade had not the requisite judicial character or means of action, that a court of law failed in practical knowledge and administrative facility, and that a Committee of Parliament was unsuited to perform such duties from its want of permanence,* and their recommendation that a commission consisting of three commissioners, one an experienced lawyer, and one possessed of experience in railway business, has been embodied in the Act, and that provision has been carried out in fact by the appointment of the Right Honourable Sir Frederick Peel, whose administrative capacity is acknowledged; Henry Macnamara, Esq., whose experience of law none will question; and W. P. Price, Esq., who, as chairman of the Midland Railway Company, has acquired a knowledge of railways and their working such as few other men can possess. If there is anything to be done to remedy the grave evils which exist in connection with our railway system surely these men will do it. The combination of experience seems to us an excellent device, and the three men, so far as their public lives are known to us, seem admirably suited to ensure the very best conditions to this new experiment in legislation. We may add, too, that their recent decision in the case of *Goddard v. The London and South Western Railway Company*, gives excellent augury for their future judicial work. But, notwithstanding these admissions, we cannot say that we are very sanguine that the Regulation of Railways Act, 1873, will do much to bring about the desirable ends which were anticipated by the Committee on the Amalgamation of railways, as set out in

* Report, p. 49.

the last page of their report.* That committee thought that an Act embodying their recommendations would effect these things. 1. Preserve the competition which now exists by sea. 2. Give immediately such support as is practicable to competition by canal, and both immediately and ultimately develop and utilize the capacities of canals. 3. Let the public know what they are charged and why they are charged, and give them better means than at present exist for getting unfair charges remedied. 4. Enforce the harmonious working and development of the present railway and canal systems, so as to produce from them in the interest of the public, and at the same time of the shareholders, the greatest amount of profitable work which they are capable of doing. In justice to the committee, it must be said that they did not think that the adoption of their recommendations would have the effect of preventing the growth of railway monopoly, or of securing that the public shall share, by reduction of rates and fares in any increased profits which the railway companies may make, but we cannot but think that, owing to various circumstances, the Railway Commission will effect little, and that, consequently, the benefit to the public will be small.

There are, however, some admirable provisions in the Act, and, although these are somewhat apart from the principal object of the statute, we cannot doubt that so excellent a commission will make itself felt most beneficially in connection with these. One of these is the provision that in case of difference between two or more Railway Companies the matters in dispute shall, with the consent of the Commissioners, be referred to them for their decision in lieu of being referred to arbitration.† "Serious and well founded complaints have been made," says the report of the Select Committee, "of the delays, difficulties, and expense attending the present system of arbitration. The persons whom it is now the custom to appoint as arbitrators are generally

* Report, p. 52.

† The Regulation of Railways Act, 1878, s. 8.

busy men who cannot give sufficient time to duties of this description, and the decisions when made have no force as precedents."* That being so, and that these statements are correct cannot be doubted, the substitution of the new tribunal for the cumbrous and expensive arbitrations which took place under the provisions of "The Railway Companies Arbitration Act, 1859," is a very evident advantage to the Railway Companies and to the public. We are glad to see, from the Table of Fees, which is given at the end of the General Orders made by the Commissioners in pursuance of the 29th section of the Regulations of Railways Act, 1873, that the fee payable for every hearing in the nature of an arbitration, in respect of each day or part of a day, is only 15 guineas. When Railway Companies come to know that they can have the services of three such men as the present Railway Commissioners for that very small sum, we cannot doubt that the permission under the 8th section of the Act will be largely taken advantage of. Then section 9 deserves some notice. That section provides that any difference to which a railway or canal company is a party, may, on the application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision. The powers given under this section are very wide, but we would have preferred to see them strengthened. As it stands, it seems to us, the section will be of little use, as before such reference can take place all the parties must agree why the terms of section nine should not have been like those of section eight and authorized a reference to the Commissioners, with their assent at the instance of either party to the difference we cannot see.

Then the transference of the powers of the Board of Trade with reference to working agreements seems to us to be extremely expedient. It has for a long time been a recognised fact that the competition which at one time existed between Railway Companies has naturally come to an end.

* See Report, p. 49.

It is asserted with some truth that there is still some slight competition between several lines in the matter of facilities, but all questions affecting rates competition is at an end, indeed competition almost invariably ends in combination. This combination is year by year widening and spreading, and the result will be that the country will soon be divided between a very small number of powerful companies who will have the whole of the railway lines in their hands, and who can dictate their own terms to the public. With the view of putting some check upon one of the means by which combination is effected, the power which the Board of Trade exercised over working agreements, and traffic arrangements have been transferred to the Railway Commissioners, who are in many respects well able to watch over the interests of the public in so far as they are likely to be affected by those arrangements between Railway Companies. The true function of the Railway Commissioner seems to be to watch over the interests of the public which are likely to be prejudiced by the self-interest and the strong hand of monopoly of the Railway Companies. They are trustees or guardians of the obscure and occult rights of the people to be protected from the exactions which are made by Railway Companies, and which are only too likely to increase as amalgamation and combination go on. The public is incapable of looking after its own interests in this relation, and, therefore, it is most expedient that they should be had regard to by a competent body of experienced guardians. This leads us to speak, however, of the main defect of the Bill, or rather, as we would suggest, of the Commissioners' reading of the Act. We gather the interpretation which the President of the Board of Trade has put upon this Act of Parliament from the appointments he has made under it; and the opinion of the Lord Chancellor as to the import of the various sections of the Act will be evident, after a perusal of the General Orders which have been issued by them, and which have been approved of by the Lord Chancellor. The mistake which, as it seems to us, the Commissioners have fallen into

is this, that they have come to the conclusion that the principal word in the Regulation of Railways Act, 1873, is the word "Tribunal." They seem to think that the Railway and Canal Traffic Act, 1854, although it could not be worked by the Court of Common Pleas, can be worked by a Court which has less judicial power, but by a Court which differs from the Court of Common Pleas only in that respect, and in having the assistance as judge, of one gentleman, not a lawyer, who has had a long experience of railway affairs and railway management. They have run away with the idea that they are to be judges, and hence we find that all the General Orders refer to their judicial duties, and none refer to the other important functions which, according to our view, they were intended to discharge. It seems to us that the difficulty which the Court of Common Pleas felt with reference to the provisions of the Railway and Canal Traffic Act, 1854, must have been much greater in the minds of the public who had to set the machinery of remedy in motion. If the judges felt a difficulty in deciding what were undue preferences or what were reasonable facilities, even with the assistance of the best evidence of the most experienced witness, it is more than probable that the public would labour under far greater disadvantages in determining whether they were getting fair play at the hands of railway companies. The great doubt which must necessarily have existed in their minds was quite sufficient to deter them from taking any action in the matter, especially when it is borne in mind that any action which they could take must be against an immensely powerful and immensely wealthy railway company. That there should be one law for the rich and another for the poor has always been a complaint, but that there should be two codes seems to us an inevitability in the present state of human nature. While the same law may be applicable to two cases, the one brought by a rich man, and the other by a poor man, a different rule will be applied to that of the former, if the latter, through his poverty, is unable to prove

his case. Although one cannot buy justice in this country, one can purchase evidence, and one who is rich can make litigation so expensive as to deter the poor from an endeavour to obtain their just remedy. To these circumstances, then, far more than to the want of efficiency of the Court of Common Pleas was due the failure of the Act of 1854. The way to encourage applications for a remedy is to make the cases in which it applies thoroughly understood. People will not plunge into the rough waters of litigation on the mere chance that by swimming they will find land; they must see or think they see the other side. But such phrases as "undue preferences," and "reasonable facilities,"—especially when there was judicial utterance that a mere private and personal inconvenience will not be sufficient to found a case under the latter of these heads, and that the general traffic arrangements of the company are to be considered,* and the like which make the indefiniteness even greater,—have no definite connotation to unaccustomed minds. As in cases of crime, it is found that a small punishment which will certainly follow the commission of the act is more deterrent than a severe punishment, which does not so certainly follow the criminal outrage; so in the case of litigation, it will be found that a certain remedy, however incomplete in relation to the injury, will encourage the public in their applications for the remedy far more than a much more complete and stringent remedy, the procurement of which is a matter of doubt. The greatest reform of law which could be made, is one which would enable suitors to see their way. That was, however, the difficulty in relation to the remedy under the Railway and Canal Traffic Act, 1854, a difficulty which was appreciated by the Joint Select Committee, to whose report we have more than once had occasion to refer, for they recommended that the Act of 1854 ought to be explained, and some attempt is made in the Regulation of Railways Act, 1873, to explain its provisions in the direction

* *Barret v. The Great Northern and Midland Railway Cos.*, 26 L. S., Q. P. 83; 1 C. B., N. S. 428.

pointed out by the Committee; still, it must be explained much more fully before the public or legal profession understand it sufficiently to make applications to the Commissioners under its provisions. This difficulty was also appreciated by the Court of Common Pleas, for in many of their judgements they narrowed the meaning of the 2nd Section of the Railway Traffic Act, 1854, with a view to clearness, and with the view of making its provisions readily understood by the profession and the public. In some ways they cut it down until it was not much more than the old equality clause which was made applicable to all railways by the Railway Clauses Consolidation Act, 1845.* Thus in one case they held that undue preference or prejudice on the ground of inequality of charge could only be complained of when the charges in question were made to persons using the *same portion* of the lines.† Justice Willes remarking that, "to bring the case within the Act it must be shown that the journeys are substantially the same." And in another case, Chief Justice Cockburn remarked that "the obvious intention" of the legislature "was, that there should be an equal rate of charges in respect of the carriage of all goods under the like circumstances,"‡ which intention had already been carried into law in almost the same words as those of the Lord Chief Justice in the Railway Clauses Consolidation Act, 1845, or nine years before the passing of the Railway and Canal Traffic Act. These efforts upon the part of the judges to make definite what was indefinite, even by narrowing the statutory provisions are important, as they indicate that they were of opinion that any such vague statute was incapable of being wielded by any Court for the benefit of the public at the instance of private suitors. Under these circumstances what hope is there that the Railway Commission will be found more efficient as a

* 8 and 9 Vict., c. 20, s. 90.

† The Caterham Junction Case (1 O.B., N.S. 410, 26 L.J., O.P. 161.)

‡ Harris v. Cockermonth and Workington Railway Company, 8 O.B. N.S. 693; 27 L. J., O. P. 162.

guardian of the public interests than the Court of Common Pleas proved itself to be, if it is to be only a Court like that from which its powers are to be transferred? That is what the Commissioners have endeavoured to make it.

Now, we were under the impression that the probable action of the Legislature would tend in a different direction; nay, we are under the impression that the Act can be read in quite another way from that in which it has been interpreted by the President of the Board of Trade and by the Railway Commissioners, and we will point out what that way is, and our grounds for regarding the construction which has been put upon it as erroneous and as being calculated to make the Act of 1873 almost as futile as the Act of 1854. We will further indicate the construction which, according to our opinion, ought to have been put upon the Act, and our reasons for thinking that had the Act been read in the way we suggest it would have proved thoroughly efficient, and the Railway Commissioners have proved thoroughly capable of dealing with some of the gravest evils which are at the present time incident to our railway system.

In 1865 a Royal Commission was appointed to consider the subject of railway communication, more especially with a view to diminution of charge and interchange of traffic, and they made a report in 1867, after a long and careful enquiry. There is one recommendation of that report, to which we would call particular attention. It recommends, as regards interchange of traffic as well as all other duties of railway companies, that wherever the public interest is affected, any person should be at liberty to memorialise the Board of Trade, and that the Board of Trade, after satisfying itself by a preliminary examination into the matter, that the complaint is well founded, should take the necessary measures to enforce the public rights by submitting the complaint for the investigation and decision of the proper court of justice. This seems to us a very important recommendation. The policy of the law seems to us to be to allow people to do as much for themselves as they can. Nothing could be

worse for the well-being of a community than that government should do everything for it. It is upon this principle that the government does not interfere in civil quarrels, but allows the parties to the difference to work out the remedy of their own grievance by an action at law. But there are many things that people cannot do for themselves. Thus, infants are protected by law during the period of their weakness or incapacity. Sailors are protected by law because they have been found to be unable to cope in the matter of wits with landsmen. So lunatics are an especial object of care, and not only is their maintenance provided for by the State, but their comfort and happiness is the object of attention to a board of inspectors or commissioners who visit all the asylums in the country. So the safety of women and children in mills and manufactories has become an object of governmental care, and the due provisions for the fencing of machinery are seen to by Government inspectors. There is one other instance which may be mentioned in which the government has undertaken to look after the interests of those who cannot pay a rational regard to their own affairs, and that is the Education Act. Now these being the principles of governmental interference we come to consider whether there is nothing analogous in the relation which exists between railway companies and the public and that which exists between any of the oppressed classes above alluded to, and those classes of persons who may tyrannize over them to the sacrifice of their interest and at the expense of their welfare. We have already seen that there is much in common between these two relations, we have seen that the crushing monopoly which is in the hands of railway companies is a power for evil and oppression which the law has attempted to deal with by various regulations, and with a view to which the Act, which is at present under consideration, was expressly framed. The question to be decided in this place, however, is whether the relation between the railway companies and the public is of such a nature as to make a direct interference

upon the part of Government, similar to that which has been alluded to above, necessary; or whether it is such that it may safely be left to those who suffer by reason of the railway monopoly to apply to a Court for a remedy. The question then is really this, whether the regulation of railways can be effected by a Court to which the applications of those who are aggrieved can be made, or whether such regulation should not be entrusted to a Court which would, at the same time, combine with its judicial functions inspectorial duties. We have already indicated that we do not regard a Court as capable of performing the difficult duties which would devolve upon it under any Act which gave them the power of regulating railways in these important particulars of preferences and facilities, and we have pointed out our reason for thinking so. To us the public who cannot determine what are undue preferences, unjust prejudices, or unreasonable facilities is in the same position that an infant is with regard to business transactions; to offer a remedy under such circumstances to the public by means of a legal process, is to our thinking upon a par with an enactment which, to ensure the humane treatment of lunatics in an asylum, gave them the power of bringing an action in a court, one of the judges of which was an able psychological physician. The passage from the report of the Royal Commission of 1865 recommended an inspectorial action of a government department (the Board of Trade) upon a memorial of the person who felt injured, and we regret to say that that recommendation has not been acted on. The reasons that the Board of Trade give for this are as follows:—

1. It is matter of great difficulty to know what is and what is not a matter of public interest. The interest concerned may be that of a single trader, of a single trade, of a parish, a town, or a county.

2. Again it is scarcely possible to say what is a grievance. The matters to be remedied are want of proper convenience and accommodation, not individual acts of injustice, such as are ordinary subjects for prosecution in a court of law.

3. The decisions, or want of decisions, under the Railway and Canal Traffic Act have shown how unsuited a court of law is to deal with such cases.

4. The plan proposed would place the Board of Trade in a false position, and would, if they were really able to interfere as proposed, throw a heavy charge on the public.

In this way one of the most excellent recommendations was passed over, and we confess that when the present Act* was passed we thought there was some hope that attention would be given to such a recommendation. To our thinking the Railway Commission was in every respect qualified to do what the Board of Trade shrunk from doing. Here were, according to our thinking, men admirably qualified to combine inspectorial functions with the exercise of judicial authority. Here were men who would be able to determine what were matters of public interest, who could determine what a grievance was, what constituted a want of proper convenience and accommodation. Our opinion that inspectorial duties devolved upon the Commission was strengthened by the fact that the Act contained a provision for the appointment of not more than two Assistant Commissioners,† and also a provision, that the Assistant Commissioners should be subject to the orders of the Commissioners, and should make such inquiries and reports, and perform such other acts and services as the Commissioners might direct.‡

The President of the Board of Trade has, however, taken a different view of the duties to be performed under the Act, for although, as we have seen, the three Commissioners have been appointed, no Assistant Commissioner, upon whom the inspectorial duties would principally devolve, has as yet been named. That the Commissioners have taken a similar view of the scope of this statute will appear from their general orders. We may allude to some of the sections of the Act in connection with the general orders of the

* 36 and 37 Vict., c. 48.

† Section 4.

‡ Section 21.

Commissioners with the view of showing that this is the case, and of showing that another reading of the Act was, at least, possible, and then we shall leave it to the reader to say whether such other reading was not expedient. First, it may be as well to point out that to some extent the principle we contend for is admitted in the Act, and to say that we are convinced that it is just in that particular, that the Act will be found admirable and just in relation to that section that the Commissioners will have cases to try and decide. The section alluded to is the 13th, and it provides that "a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by this Act, may be made to the Commissioners by a municipal or other public corporation, local or harbour board, without proof that the complainants are aggrieved by the contravention; provided that a complaint shall not be entertained by the Commissioners in pursuance of this section, unless such complaint is accompanied by a certificate of the Board of Trade to the effect that, in their opinion, the case in respect of which the complaint is made is a proper one to be submitted for adjudication to the Commissioners by such municipal or other public corporation, local or harbour board."* Now, this is, to our thinking, perhaps the most important provision of the Regulation of Railways Act, 1873, and if the Commissioners continue to construe the Act as simply endowing them with judicial powers instead of conferring upon them inspectorial duties it is almost the only one which will be productive of any business which will come before

* This principle is to a certain extent carried out by section 6 of the Act, which provides that "Any person complaining of anything done, or of any omission made, in violation or contravention of section 2 of the Railway and Canal Traffic Act, 1854, or of section 16 of the Regulation of Railways Act, 1868, or of this Act, or of any enactment amending or applying the said enactments respectively, may apply to the Commissioners; and upon the certificate of the Board of Trade alleging any such violation or contravention any person appointed by the Board of Trade in that behalf may in like manner apply to the Commissioners, &c." The way to make this thoroughly effective would be to allow the Board of Trade to appoint one of the Assistant Commissioners, upon whose report the Commissioners might act. To do this, all that would be necessary would be a revision of the General Orders.

them. Here we have, in fact, an admission of the principle that the care of the interests of the public as to those matters of prejudice, preference and facilities, must be undertaken by a public body—(in this case working with and under the Board of Trade). Here we have a carrying out to some extent of the provision of the Royal Commission of 1865, which recommended a submission of a case for investigation to the proper court after it had been enquired into by the Board of Trade. But passing from this admirable provision, we will consider the sections of the Act which seem to us to imply the exercise of inspectorial functions by the Railway Commissioners.

First, it is to be noted, that in connection with working agreements, which are about to be entered into by railway companies, the Railway Commissioners have a right to hear objections,* and must approve of any such working agreement before it comes into force, but further it is provided that at the expiration of the period of ten years after the making of such agreement the Commissioners may, if they are of opinion that the interests of the public are prejudicially affected thereby, cause it to be revised, and may modify the agreement so as to make it more conformable to the public interest.† There is a similar provision with reference to the revision of the powers of railway companies relative to steam yessels.‡ How are the Commissioners to discover whether the interests of the public are prejudiced by an examination of a copy of the working agreement? Is it to be expected that railway draughtsmen will be so inexpert as to allow any prejudice which is likely to arise under such an agreement to appear on the surface? What would strike one as being the best method of discovering whether a modification of such agreement, or whether the limitation of the

* Railways Clauses Act, 1868 ; Part iii. sect. 24.

† The Railways Clauses Act. Part iii., s. 35. And the Regulation of Railways Act, 1878, s. 10.

‡ Railways Clauses Act, 1868. Part iii., s. 27. And the Regulation of Railways Act, 1878, s. 10.

exercise of such powers would be for the advantage of the public? Surely a visit to the place, an enquiry amongst the people, a personal examination of the facilities afforded. Yet the commissioners, by general order 6, provide for an application, and by their directions relating to working agreements, recently issued, they make it necessary that certain documents should be left with such application at their office.

Section 14 provides that every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place, to which such rate is charged. There is no provision in the Act for the discharge of the Commissioners' duties with reference to this section, but the Commissioners, instead of providing for the inspection of such books from time to time by one of their number, or by one of the Assistant Commissioners, who bring skilled knowledge to bear upon the difficult questions involved, have provided (general order 9) for an application for a summons, calling on the railway company to show cause why they do not comply with the Act. But it appears from the report of the Joint Select Committee on Railway Companies Amalgamation* that the publication of rates in this way with reference to goods traffic was a most difficult and complicated operation,† and if the preparation of such a record is found a difficulty by a railway company, the comprehension of such a record when prepared would be impossible to any person who might feel himself aggrieved, and might inspect the book with a view to ascertaining the real facts of the case. An ordinary Bradshaw's Guide puzzles most people.

* Report, p. 88.

† This also appeared from the evidence given before the Railway Commissioners in *Goddard v. The London and South Western Railway*.

Section 17 provides that "every railway company owning, or having the maintenance of, any canal, shall at all times keep such canal and all the reservoirs, works, and conveniences in connection with it thoroughly repaired and dredged and in good working condition, and shall preserve the supplies of water to the same, so that the whole of such canal or part may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption, or delay." Here, again, there is no provision in the Act for the enforcing of this section, but the commissioners have (general order 17) provided that they shall enforce this, not by inspection, but through an application for a summons calling on the railway company to show cause, and, if necessary, by an order. We cannot think that this will have the desired effect. In every one of these cases it is to be remembered that the fight will be between the lean purse of a poor man and the fat purse of a wealthy company; that circumstance is of itself sufficient to deter most people from seeking their remedy. To most it will seem that in such a case the cure would be worse than the disease. Under such circumstances skilled inspection by the commissioners or by some one appointed by them would, to our thinking, be a better method of discovering whether the provision of the Statute were complied with or not, and consequently much more beneficial to the public. But further there is an express provision for inspection under section 25 sub-section (a), which says, "They" (the Commissioners) may, by themselves, or by any person appointed by them, prosecute an inquiry, enter, and inspect any place or building, being the property or under the control of railway or canal company, the entry or inspection of which appears to them requisite."

These are wide powers, and might, in our estimation, if judiciously exercised, be productive of much good to the community. But the word "tribunal" was still ringing in the Commissioners' ears when they read this section, and they seem to read this sub-section as if it referred only to enquiries

which became necessary in the hearing of a cause, for by general order 16 they declare that, if the Commissioners at any stage of the proceedings think fit to direct inquiries to be made under section 25 of this Act, or under section 3 of the Railway and Canal Traffic Act, 1854, they shall give notice thereof to the parties to the application, and may stay proceedings or any part of the proceedings thereon until further notice from the Commissioners.

Such, then, are the principal provisions of the Regulation of Railways Act, 1873, and such is the way in which the Commissioners mean to exercise their powers under that Act. Some of the provisions are, as we have pointed out, admirable—as in cases under section 13. The Act is likely to be very beneficial, but as a whole, we cannot but think that it may prove very futile like all the previous railway legislation which was intended to check railway monopoly, foster canal competition, preserve the present dependence of sea traffic, and in those ways benefit the public. If that is the result we shall ascribe it to the fact that the Railway Commissioners have regarded their whole duties as judicial instead of regarding them as in a very important way inspectorial. If that is not the result we shall ascribe it to the fact that the principle for which we have contended in this essay is embodied in the 13th section of the Act.

NEW QUEEN'S COUNSEL.—The following have been appointed as Her Majesty's Counsel: England—Mr. Charles Clark, Editor of the House of Lords Reports; Mr. Arthur Cohen, Mr. Murphy, and Mr. S. Joyce, of the Home Circuit; Mr. Waddy, of the Midland Circuit; and Mr. R. G. Williams, and Mr. Charles H. Hopwood, of the Northern Circuit; and Mr. T. E. Winslow, Mr. T. Waller, Mr. W. R. G. Bagshawe, Mr. W. Pearson, Mr. John Westlake, Mr. Joseph Chitty, and Mr. A. G. Marten, of the Equity Bar. Ireland: Mr. Robert Ferguson, Chairman of the Quarter Sessions, County Cork; Mr. J. Chute Negligan, Chairman of Quarter Sessions, County Leitrim; Mr. Edward F. Litton and Mr. Thomas E. Webb, Professor of Laws in the University of Dublin.

III.—ON AN INTERNATIONAL CODE.*

By DAVID DUDLEY FIELD.

SEVEN years ago, at the meeting of this Association, held at Manchester, it was my good fortune to propose the appointment of a committee to prepare the outlines of an International code. The proposition was received with favor, and a committee was appointed, composed of jurists from different countries. In the distribution of the labour of preparing the outlines, a portion was assigned to me, it being understood that the different members of the committee should first interchange what they had respectively prepared, and then meet for a general revision. This, however, was found to be difficult. The members lived at too great distances from each other for an easy interchange. Under this embarrassment, I thought it more convenient for the other members of the committee, as well as for myself, to undertake a draft of the whole work, hoping that the others would take the same course. The work thus undertaken by me has been completed after several years of labour; and I come now to lay it before my colleagues, and with their permission before the Association itself.

It should seem proper, therefore, for me to give you a brief account of the scope and contents of the work to which I thus venture to invite your attention. The importance of the subject no reflecting person can doubt. One has but to open his eyes upon what is passing before him to perceive the necessity and extent of public law. Whether he remains at home or goes abroad, whether he travels by sea or by land, this law is ever present with him. Let us suppose to be at sea. Let us take, for example, the great ship, the City of

* This is an Address by Mr. Dudley Field on an International Code of Law delivered at the late Social Science Congress held at Norwich.

Chester, in which the other day I crossed hither from the farther side of the Western Ocean. As this vast fabric of wood and iron, cordage and canvass, with its outspread wings and its heart of fire, swept on its triumphant way, scarcely swerving to the right or to the left, for aught that wind or storm could do, I thought what an illustration it afforded of that public law which was at once the governor and guardian of the whole company, five hundred souls in all, gathered within these iron walls; how happened to come.

The ship was English, with an English crew. The passengers were members of various nationalities—English, American, German, French, Italian, and I know not how many more. The freight was destined to different ports of Europe. Observe, now, in what manner and by what standard the rights and duties of this mixed company of passengers, of master and mariners; and of the owners of ship and cargo, were to be measured and judged. To avoid collisions with other ships, precautions had to be taken by the display of lights at night, by signals in thick weather, and by steering a particular course when other ships appeared in sight, in conformity with the rules of navigation now adopted by maritime nations. On meeting other vessels we conversed with them in that common language of sea signals, which the mariners of every nation should learn. If a collision had occurred, the wrong doer and the amount of wrong done, would have been adjudged by the first Court of Admiralty to which the case should, according to the general rules of maritime law, belong. Had another ship, sailing in the same sea, fallen into peril and been rescued by us, salvage would have been awarded by the same Court and according to the same law. Had the vast and complex machinery by which we were impelled broken down, and, in a disabled condition, we had been driven on the French coast, we should have fallen under the jurisdiction of the French courts, where our rights would have been adjudged, not so much according to French law as according to that law which is common both to France and England, to America, and to all the world—the

law of nations. If, to escape a sea peril, a portion of the cargo had been thrown overboard, the loss arising from the jotsom should have been apportioned according to a rule of average common to all civilized nations, though, unfortunately, a common rule has not yet been agreed upon. Besides these questions, how many others might arise? Suppose a contract or a testament to be made during the voyage, by what law should it be interpreted, or its validity determined? Suppose a contract between an Englishman and an Italian, and the same to be brought before a French court; or suppose a testament to be made by a German, according to the form used in Germany, and to be brought before an English court, where are the rules to be found by which the questions should be decided? We might imagine other questions, and many of them, in respect of collision, jotsom, wreck, salvage, or personal violence, and ask ourselves how those questions would be solved by the Courts of England, of France, or Belgium or Holland, and we should see more clearly the importance of that law, which is not confined to one country or race, but is or should be common to all countries and all races.

From these illustrations in reference to a single vessel, out of thousands on the seas, it is easy to perceive how vast is the extent and how varied are the details of public law which is designated variously as international law or the law of nations. In the outlines of that science which I have attempted will be found a scheme of classification, and an arrangement of subjects, not perhaps the best that can be made, but the best that I could make. The work is divided into two books; one relating to peace, the other to war; or, to speak more accurately, the first treats of the relations of nations and of their members towards each other, except as they are modified by a state of war; the second treats of the modifications of those relations produced by a state of war. The first book is further subdivided into two portions, one containing the rules respecting the relations of nations to each other and to the members of other nations; the second

respecting the relations of the members of each nation to the members of other nations ; the first being that which is commonly known as public international law ; the second, that which is known as private international law. Bearing these divisions in mind, let us glance at some of the more important provisions which they contain. Besides the regulations which are usually discussed in works on international law, there are many others which, though often mentioned in treaties, do not usually find a place in general treatises. Thus, after considering the essential rights of nations, such as their sovereignty, equality, perpetuity, territory, property, and treating of their extra-territorial action in respect of navigation, discovery, exploration, and colonizations, of fisheries and piracy, of the intercourse of nations with each other by means of accredited agents, of international compacts, of asylum and extradition, of national character and jurisdiction, of domicile and of the reciprocal duties of nations to foreigners, and of foreigners to the nation where they live, in respect of residence, occupation, religion, obedience to the laws, taxation, civil and military service, other provisions for mutual convenience are inserted to the subjects of which I attach much importance. These relate to shipping, imposts, quarantine, railways, telegraphs, postal service, patents, trade marks, copyrights, money, weights, and measures, longitude and time and sea signals.

In respect to copyright, patent-right, and trademarks, I would assert the right of the author, inventor, or first designer, as one to be held sacred and maintained in all countries. Longitude I would compute everywhere, as do the English, from Greenwich, instead of taking it for the maps of one country from Paris, and for those of another from Washington. For weights and measures I would adopt the Metric system of the French ; and, as to money, I would have a uniform coinage of certain pieces of gold, which should pass current in every country, and thus save travellers and traders from the loss and embarrassment to which they are now subject.

Then comes that part of the code which contains provisions intended for the preservation of peace. They would require, first, that there should be a simultaneous reduction of the enormous armaments which now weigh upon Europe; secondly, that if any disagreement or cause of complaint should arise between nations, the one aggrieved should give formal notice to the other, specifying in detail the cause of complaint and the redress sought; and that this complaint should be formally answered within a certain period. If such a course had been pursued by France and Germany before the fatal declaration of July, 1870, we should probably have been spared the last Franco-German war. A provision somewhat similar has already been inserted in treaties of the United States with Portugal, Bolivia, Guatemala, Peru, St. Salvador, and New Grenada. Thirdly, it is provided that when the parties do not otherwise agree, they shall appoint five members of a Joint High Commission, who shall meet, discuss the differences, and endeavour to reconcile them. If the reconciliation thus sought fail nevertheless, a high tribunal of arbitration is to be appointed in this manner—each nation joining in the code transmitting to the parties in controversy the names of four persons, and from the list of these the parties concerned alternately striking off one after another, until the number is reduced to seven, which seven is to constitute the tribunal. Is there anything chimerical or impracticable in this? Let me refer you to the last great arbitration at Geneva for an answer to this question. Let me go farther back and refer to the history of the American Confederation. We begin with arbitration. When the independence of the Colonies was declared, they formed articles of Confederation, one feature of which was that disputes between the States should be decided by Commissioners selected by the disputants; or, if they failed to select them, by commissioners chosen in this way; three to be named by Congress from each State, each disputant to be at liberty to strike off alternately one name till the number was reduced to thirteen, from which thirteen, not

more than nine, nor less than seven, as Congress might direct, were to be chosen by lot to constitute the Commission. A more perfect system was afterwards established under the present constitution, which created a supreme court as the ultimate arbiter between contending States. Controversies between the States have already been adjudged by this court. One between Rhoda Island and Massachusetts; one between Iowa and Mississippi; in which the court fixed the boundary between them, and enjoined each from exercising jurisdiction beyond it. A suit was begun by New Jersey against New York respecting the boundary along the Hudson, which was finally compromised by the agreement of 1833, entered into between the two States, with the sanction of Congress. Suits have been brought by New York against Connecticut; by Alabama and Florida, each against Georgia, and between Maryland and Virginia, and between New Jersey and Delaware.

Why could not the plan of arbitration be extended to Europe? This continent contains eighteen independent States, counting the little communities of San Marino, Monaco, and Andorra; and considering Sweden and ^{Prussia} ~~Poland~~ and Germany as united, wanting only the Austro-German Empire. Ten only of these States exceed in wealth and population the richest and most populous States of the American Union. These ten are the United Kingdom of Great Britain and Ireland, France, Germany, Russia in Europe, Austria, Italy, Spain, Turkey in Europe, Sweden, with Norway, and Belgium. The five States of Holland, Portugal, Switzerland, Denmark, and Greece, are each less in population than New York. Even Belgium has only 400,000 more, and Sweden and Norway together have only about a million more than New York. There can hardly be a sufficient reason why Holland, Portugal, Switzerland, Denmark, and Greece, should not submit their differences to arbitration or to a permanent court, as well as New York and Pennsylvania. And if these five European States should be made to do so, why not France and Germany? The only reason, if reason there be,

is that France and Germany are more powerful ; that they would not consent to compromise in any respect their freedom of action, and that in case of refusal they could not be coerced. To this it may be answered that the rights of France and Germany are not more sacred than those of Switzerland and Portugal ; that the constraint upon their independence and freedom of action, by a voluntary compact to submit their differences to arbitrament or judgment, is not more derogatory to their true honour, and is not more dangerous to their independence and freedom of action, than to a smaller State. Of the two, if there be any difference in that respect, the weaker State is in greater danger than the stronger. The American system binds and coerces populous and opulent States, sovereign in everything except as they have limited their sovereignty by their own free will, and for the advantage of their own people. New York has already nearly four millions and a half of inhabitants ; Pennsylvania, three millions and a-half ; and Ohio two and a-half millions. When New York is as densely peopled as England and Wales, it will contain 16,000,000 inhabitants. But there are seventeen States larger than New York ; Texas, California, Nebraska, Oregon, Minnesota, Kansas, Missouri, Nevada, Florida, Michigan, Illinois, Iowa, Wisconsin, Georgia, Arkansas, Alabama, and North Carolina. How much larger will appear when we place the 47,000 square miles of New York side by side with the 247,000 of Texas, or the 189,000 of California ?

If the population of Texas were ever to equal in density that of England and Wales, it would amount to 85,000,000, and that of California, under the like circumstances, to 65,000,000.

Americans are confident that their constitution is strong enough to control their largest States with all the population and resources of which their magnificent future gives them the promise. Measuring the future by the past, the next half-century will see some of the States as powerful as the larger European States ; and unless it be supposed that

the American is more patient of control, and more obedient to law than his European brother, it should seem to be no harder a problem how to bring European States to submit their differences to the arbitrament of reason and law, than it is how to make American States do the same thing. Great Britain and Ireland have 30,000,000 of people; France has 38,000,000; Germany, 39,000,000; Russia in Europe, 68,000,000; Austria, 35,000,000; Italy, 25,000,000; Spain, 16,000,000; Turkey in Europe, 5,000,000; Sweden and Norway, 5,897,000; and Belgium, 4,839,000. The ratio of increase in America is about 35 per cent. every ten years. This ratio will give America a population as large as the whole of Europe in a little over fifty years. At the present ratio of increase, New York will contain in 1880 more people than Belgium, and in 1890 more than Sweden and Norway. If Texas and California are not subdivided, the time will come when they will have a population as great as any European State saving perhaps Russia. Texas, it is said, has as large a proportion of fertile land as Italy, and capable of sustaining relatively as great a population. Italy has 25,000,000 of inhabitants; Texas, as densely peopled, would have 57,000,000; and California 43,000,000. There is therefore nothing in the size, or strength, or riches of European nations to prevent their entering into and being permanently bound by a compact to settle their dispute by arbitration.

I do not mean to say that every claim which one nation may make upon another should be submitted to arbitration. There may be claims which no self-respecting nation would submit to any arbiter, such as those which touch its equality or independence. To put an extreme case. Suppose Spain were to claim the sovereignty of Holland, pretending that it had been lost by Phillip II. or by any of his successors, I would not have Holland submit such a claim to the decision of any arbiter or of any human power. It is not difficult, I think, to draw the line between questions which may not, and those which may be submitted, and it is the latter

only which fall within the category of disputable and referable questions according to my view of them.

After the provisions respecting the preservation of peace which I have mentioned, the code proceeds to the subject of private international law, making uniform provisions respecting private rights and the administration of justice. Here are grouped together regulations concerning personal capacity, social condition, the validity and interpretation of contracts, the effect of foreign marriages and divorces, the devolution of property at death, the administration of justice, procedure and evidence, as they apply to the persons and property of foreigners.

The second general division relates to war in its effect upon the rights and duties of belligerents, allies, and neutrals. In respect to belligerents, there are regulations respecting the commencement, the conduct, and the termination of war. The general design has been to confine war to persons in military service, and their operations against property to that which is public. Private war and public war upon private property are alike prohibited. The provisions of modern treaties forbidding the use of certain deadly weapons, and exempting hospital surgeons and nurses, are taken and extended. The bombardment of defenceless places is absolutely prohibited. The various chapters are entitled thus—Of those who may wage hostilities; against whom hostilities may be waged; the instruments and modes of hostilities; truce and armistice; medical and religious service; prisoners; hostilities against property; contraband of war; visitation, search, and capture; blockade; prize; and the effect of war upon the obligations of nations and their members, upon the intercourse and the administration of justice. In respect of neutrals, the absolute right of a nation to remain neutral while others are at war is asserted in the strongest terms. England has often acted upon this principle, and never with greater effect than with respect to Belgium during the last great war. What is neutrality? What may a neutral nation do? what ought it to do? and what ought it not to

do ? These questions, and the three rules of the Treaty of Washington, are next considered.

This is, in brief, a sketch of the present attempt to aid in the formation of an International Code, suited to the civilization of these nations, and to the Christianity of this nineteenth century of the Christian era.

Since these outlines were prepared, two important steps have been taken towards the establishment of an International Code. One was a Conference held at Ghent on the 8th of last September, where an institute of International Law was founded. This institute has undertaken to treat of several important subjects during the next year, and to meet again in August, 1874, at Geneva, for future action. The subjects to be treated are—International Arbitration ; the Three Rules of the Treaty of Washington ; and Private International Law. A committee of eight was also appointed to attend the forthcoming Conference at Brussels. This Conference, which will begin its Session during the present week, on the 10th of October, had its origin in a meeting held in New York on the 15th of May, at which a resolution was passed that a meeting should be called for consultation upon the best method of preparing an International Code, and the most promising means of procuring its adoption. A committee of five was accordingly appointed, by whom the Conference, which is to take place on the 10th of the month, has been called. We hope to see representatives there not only from America but from every nation of Europe. The plan proposed is first to consider the expediency of an international code ; and, if found expedient, how it should be prepared and proposed for adoption ; and, next, the question of arbitration for the settlement of international disputes. In short the object of the Brussels conference is to take the preliminary steps for the establishment of a code of the law of nations, containing among its provisions a scheme of international arbitration.

In this we shall have, I am sure, the sympathy of every lover of his race. Of all the calamities which afflict man-

hood, war is one of the greatest. I do not say that it is the greatest of all, for I think that national degradation and slavery, or general corruption and the reign of fraud, are evils greater even than war. An oppressed people may and must rise against its oppressors. A nation attacked may and must defend itself. He who would not fight to the death in defence of his family or his country is not fit for this world. But in proportion as the defence is just, the attack is unjust. There would be no occasion for the rising of an oppressed people, if there is no oppression, and no need of defensive war if there were not first an aggressive war. And, of course, in proportion as you diminish the aggression, you diminish the defence. In other words, if there were no aggressive and unjust war there would be no war of defence—that is to say, no war at all. I would not detract in the least from the merits of those great captains who, fighting for the rights of their countrymen, have earned renown, nor would I dispute that there is in war frequent occasion for, as there has often been a display of high heroic virtues. But the great men who displayed these virtues have themselves deplored the occasion and the evils of the war which they had been obliged to wage. Our own Washington was not only first in war but first in peace, as he was first in the hearts of his countrymen; and it was the Duke of Wellington, if I remember right, who said that there was nothing worse than a battle gained except a battle lost.

I would not, indeed, discourage the cultivation of the heroic virtues or take away the opportunities for their exercise; but assuredly war is not the only school where they can be cultivated or exhibited. There will always be suffering enough in the world for the exercise of all the virtues. Does not the ship master who puts his ship about in a stormy sea at the signal of a shipwrecked brother, and stays by him through the dark and perilous night till the daylight comes, that he may save him at the risk of his own life—does not he exhibit as much heroism as any of those who fought at Waterloo? Did not the captain of the Northfleet,

who the other day calmly accepted death that he might save women and children, display as much heroic virtue as any of the brave six hundred who charged at Balaclava? Was Howard less a hero than Marlborough? Would you not as soon deserve the eulogy which Burke pronounced upon the former, as the poem with which Addison celebrated the victory of the latter? Let him who would win renown through labour, endurance, and self-sacrifice, go abroad into the world and make war upon the wrong with which it is filled.

Excepting the national degradation or national corruption to which I have referred, I can conceive nothing so horrible as those bloody combats which have so often desolated the world. The spectacle of two nations arming themselves to their utmost, and doing all they can to destroy life and property, ravaging each others' fields, burning each others' villages, bombarding each others' cities, maiming and slaughtering each others' people—such a spectacle is insulting to God and sickening to man. The demoralisation which is the concomitant or the certain follower of war, the revulsions in trade, and the national debts increased, weighing down the industry of generations, are but so many "horrors on horrors' head" accumulated.

I am not sanguine enough to suppose that in our time war is to be put an end to altogether; but I do suppose that increased intercourse and the general progress of civilization have more and more inclined men to the ways of peace. The armor that to-day hangs useless in your baronial halls, the battlements that now serve for ornament in place of defence, the walls of cities once formidable but now converted into promenades, are so many witnesses of successive steps in the progress from continual war to frequent and long-enduring peace. I do suppose, further, that by judicious international arrangements, the chances of war occurring may be lessened, and that when unfortunately it does occur its evils may be mitigated. Such is the aim of my co-workers and myself in our efforts for the amelioration and

codification of the law of nations. Such has been the object of the imperfect work which I now place, with all its defects, in the library of this association, the closing act of a task undertaken seven years ago, and now fulfilled.

[In inserting the above in deference to the ability and authority of Mr. Dudley Field, we cannot help observing that there is all the difference in the world between the position of the various American States under one Supreme Government, and independent nations such as Great Britain and France.—ED. L. M.]

APPOINTMENTS.

Sir Samuel Martin has been sworn in a Privy Councillor, and will take his seat on the Judicial Committee; Lord Cairns has been appointed Lord Chancellor; Mr. R. Assheton Cross, Secretary of State for the Home Department; Sir John Karslake, Attorney General; Sir Richard Baggally, Solicitor-General; Mr. J. Dugdale, Recorder of Grantham; Mr. H. B. Poland, Recorder of Dover; Mr. C. Chapman Barber, Judge of the County Courts of the East, West, and North Ridings of Yorkshire; Mr. John Balguy, Stipendiary Magistrate of Greenwich; Mr. Charles Coleman, Stipendiary Magistrate of Sheffield; Mr. Woodthorpe Brandon, Assistant Judge of the Lord Mayor's Court; Mr. J. Balfour Browne, Registrar to the Railway Commissioners; Mr. J. A. Freeman, Town Clerk of Brighton. *Ireland*.—Mr. Christopher Palles, late Attorney-General, has been appointed Chief Baron of the Exchequer; Dr. Ball, Attorney-General; Mr. Henry Ormsby, Q.C., Solicitor-General; Mr. George May, Q.C., Legal Adviser at the Castle. *Scotland*.—Mr. George Young, the late Lord Advocate; Mr. Gordon, Lord Advocate, has been appointed a Judge of the Court of Session; Mr. John Kirk, Director and Principal Clerk in Chancery. *Cape of Good Hope*.—Mr. J. H. De Villiers has been appointed Chief Justice of the Supreme Court; Mr. S. Jacobs, Attorney-General; and Mr. De Wet, Solicitor-General. *Egypt*.—Mr. James Lane has been appointed Judge of the Chief Consular Court for Egypt; Mr. John Scott, Judge of the Consular Appellate Court. *India*.—Mr. F. Clarke has been appointed Receiver of the High Court of Bengal; Mr. R. Evans, Assistant Magistrate and Collector of Cawnpore; Mr. E. H. Little, C.S., Registrar of the High Court of Bombay during Mr. Jardine's absence.

IV.—ILLUSTRATIONS OF OUR JUDICIAL SYSTEM. PART XVI.

By W. F. FINLASON, Editor of the "Common Law Procedure Acts," of "Nisi Prius and Crown Reports," and of "Reeves' History of the English Law."

THE BANKRUPTCY SYSTEM.

CLOSELY associated with the Chancery is the Bankruptcy system, which, in many respects, comes nearest to the rational system than any other, though it is, like all the others, marked by some anomalies. It is in this respect a rational system, that its judicature is locally diffused; for there are bankruptcy courts in all the principal towns in the country, and in the next place this enables the courts to adopt a rational procedure. The bankrupt is orally examined in open court, in the first instance—the course of procedure originally pursued, both in courts of equity and law, and which only became obsolete and abandoned because of the want of an adequate judicature. The whole procedure in Bankruptcy is, in fact, based upon this preliminary oral examination of the bankrupt, who answers to the defendant in an ordinary suit. He is, in fact, the party sued in a species of suit partly legal and partly equitable, by a body of creditors as plaintiffs or complainants. And the first thing is an oral examination of the defendant. That which was the original procedure at law and equity ages ago, and became obsolete only on account of inadequacy of judicial power, has been revived and restored in deference to the exigencies of modern times. And every day, in every Bankruptcy Court in the country, there are afforded illustrations of the efficacy of the process, as simple as it is effectual. To begin with, the bankrupt has to furnish a written statement on oath, which may be likened to the answer in Chancery, but with this great difference in favour of the Bankruptcy

system, that the defendant is liable, at once, to be orally and openly cross-examined in the presence of his creditors. As the examinations may be taken by the registrars, and there are local Courts of Bankruptcy (the County Courts), in every principal town, these examinations can easily be instituted everywhere, and they are going on every day. They can be adjourned, moreover, from time to time, in order to afford time for further enquiries, and to test the statements of the bankrupt, and acquire information on which to ground further examination. Under such a searching investigation it is hardly possible that any transaction can long remain concealed or undisclosed. Upon the information thus required, other persons can be ordered to attend and be examined, and special statements can be required from the bankrupt, as to any matters which appear to require further examination. We see such reports as these :—"The bankrupts, it appeared, had made large consignments to foreign parts, and at the instance of the trustee, they had been required to furnish very special accounts showing the disposition of the property. The necessary statements were filed on the bankrupt's behalf, but the trustee required time to investigate them, and upon an examination of the bankrupts it was elicited that they had never seen the statements in question. The Court ordered an adjournment." And we see also, after the examinations and investigations, applications against the parties who appear to have the property of the bankrupts.

Evidence it is to be observed may be taken literally or by affidavit, in which respect it resembles the Chancery system, and has greater efficiency, economy, and elasticity than the common law system. Oral evidence may be required where it is preferable, written evidence can be received when it is sufficient ; and both may be combined whenever both appear to be required. The Court, it is to be borne in mind, is a court of law and equity, and can if necessary direct an action or issue to be tried by a jury on a question of property

or dispute, if that course appears to be desirable.* Thus, it appears eminently to possess all the necessary powers for the effective discovery of and the full administration of justice. Not only are there Bankruptcy Courts in all the chief towns, but the judges have unlimited powers of delegation. The Rules of 1870, provide :—

4. "The chief judge in bankruptcy may delegate to the registrars of his court such of the powers vested in him by the Act as such judge may deem it expedient to delegate, except the power to make an order to commit a person for contempt.

5. "The judge of a County Court may delegate to a registrar of his court, but to no other officer, such of the powers vested in him by the Act as he may deem expedient to delegate, except the power to make an order to commit a person for contempt.

6. "Every order made by a registrar while acting under any delegated power, shall have the same force and validity as an order made by the judge, but the registrar may, if he shall think fit, adjourn any matter for the opinion of the judge.

7. "The examiner or registrar may, if he think fit, or at the request of any party, adjourn any matter coming before him for the consideration of the judge.

9. "Affidavits may be sworn before the examiner or any other officer appointed to take oaths in the court as heretofore, or before any Commissioner for taking oaths in Chancery, or at common law or before a magistrate.

10. "Applications to the court shall be intituled in the same form as affidavits, and shall be according to the form in the schedule hereto, unless the Act under which the application is made otherwise directs."

All proceedings are in the most simple form, by way of petition on affidavit, setting forth all the material facts. The local courts are all affiliated to the chief or central court, and there are ample provisions for the exercise of appellate jurisdiction. The Court of Bankruptcy "has all the powers of a Court of Law and Equity, for the purpose of doing complete justice, and making a complete distribution of property among the plaintiff's creditors." Hence it affords an admirable example of a court exercising the powers of

* *Ex parte*—"Law Times," Aug., 1872.

both jurisdictions. The court can use all the powers of a Court of Equity, for the purpose of discovering and protecting the property, and securing it for creditors. Thus, for instance, it can appoint a receiver, and it can issue an injunction to restrain a sale of property belonging to the estate, and it can even, if necessary, appoint the Registrar a trustee in cases of failure, or default of creditors to appoint one, in order to prosecute the proceedings. These powers, especially those of appointing a receiver and issuing an injunction, are extremely valuable and effective, especially coupled with the fullest powers of discovery. These powers also are all exercised by the judicial officers of the courts, and not merely by the judge, and therefore are exercised with all the requisite promptitude—on mere oral application, without any formal preparation—on the mere filing of the petition. Thus we find such cases as these, of daily occurrence in the Court of Bankruptcy:—"The debtor, presented his petition for liquidation on the 17th inst. On the 20th, that is three days afterwards, an attorney on behalf of the debtor and of creditors, asked for the appointment of a receiver, and nominated an architect and surveyor. He said it was desirable in the interests of creditors that the debtor should be allowed to continue business without molestation. His Honour, upon production of the usual evidence of fitness for the office, appointed the receiver as proposed." It would be impossible to conceive of a tribunal whose procedure could be more simple and effectual. As to the duties of the receivers, be it observed, they are regarded as the officers of the court, and act under its direction.† In another case, a trader died on the 6th March, and on the 9th a receiver was appointed on his estate to protect the interests of creditors.‡ These stringent powers the most potent powers of a Court of Equity, issuing injunctions and appointing receivers are exercised by the Registrars in the

Court of Bankruptcy, Basinghall Street, Aug. 20th, 1872.

† Ibid.

‡ On March 9th.

London Court, and by the County Court judges in the provinces, so that justice is easily attainable everywhere, the powers of the court being everywhere localised and diffused. Thus we find the County Court judges everywhere, at all events in all the principal towns in the country, exercising the most potent powers of a Court of Equity in that large and important class of commercial cases which arise in bankruptcy, and exercising these powers, moreover, more summarily than a Court of Equity, on mere oral application upon affidavit, always, however, with the power of oral examination of the debtor upon oath, and of summoning persons on information thus obtained. It would be impossible to imagine a judicial system more effective, whether as to organization or procedure. Nor is it only orders protective which are made by the County Court judges in the exercise of this potent jurisdiction, they even exercise the still more potent powers of Courts of Equity in setting aside dispositions of property as inequitable, and this to any amount. Now here we find a County Court judge exercising a summary equitable jurisdiction to set aside disposition of property to the amount of hundreds of pounds, subject only to appeal, although these very judges have not a compulsory jurisdiction in Common Law cases above £50! Here the value of the property at stake was, may be, many hundreds or many thousands; yet, the County Court judges have jurisdiction, and a jurisdiction equitable, as well as a legal, and infinitely more stringent than at common law, and exercised more summarily than in a superior Court of Equity! The only check is the power of appeal, and we see that the County Court judge is sometimes found to be right, even when the chief judge in Bankruptcy thinks him wrong, so that it is clear there is no danger with jurisdiction. Sometimes appeals turn upon the facts, and this always causes a difficulty. The true principle upon this subject was lately stated very clearly by that eminent judge, Lord Justice Mellish, whose mind has been enlightened by ample experience of different systems. In a recent case in which

on a question of fact there had been an appeal to the County Court in Bankruptcy to the Chief Judge, and thence to the Lords Justices, he said in giving judgment :—" He thought it was a great misfortune that in a case of this kind a question of fact should have to be decided by three tribunals, the County Court, the Chief Judge, and this Court of Appeal. His Lordship could not help thinking that this rose in a great degree from the County Court Judge not hearing the witnesses himself, or having the questions of fact tried by a jury, as he might do. If this were done, the decision in the County Court on a question of fact would never be altered on appeal unless it were plainly contrary to the evidence. The practice, on the contrary, seemed to be to have the evidence taken before the Registrar, and the Judge who decided the matter in the first instance had not the advantage of seeing and hearing the witnesses." From this it may be inferred that this eminent judge considers that in questions of disputed fact, the Judge of first instance should see and hear the witnesses examined, and then, on his statement of the facts as found and ascertained an appellate Court can determine. But then it is for the judge, according to the Chancery system, which is most elastic, to decide when the matter is so far one of disputed fact as to require this course to be pursued, and when it is, a Chancery Judge knows well how to avail himself of the assistance it affords for the discovery of the truth. Thus, in a case tried before Vice-Chancellor Wickens, in May last, the defendant was cross-examined on oath in open court.† And so the claimant in a more recent application before Vice-Chancellor Malins. That Chancery Judges are well aware of the comparative worthlessness of mere affidavits on questions of disputed fact, and contradictory testimony, appears constantly from their observations on cases before them. Thus for instance in a recent case, as we pointed out last November.

Such is the Bankruptcy system which deals with an enor-

* *Ex parte Boyle.*

† *Dacre v. Park, Times, May 3rd, 1872.*

mous amount of property. The total amount of property thus dealt with under the Bankruptcy system is to be estimated by millions and infinitely transcends the small amount cognizable at Common Law. In 1871 1,351 debtors were adjudicated bankrupt. There were 1,274 first meetings of creditors held; trustees were appointed in 1,201 cases, and with a committee of inspection in 847 of that number. In the 1,351 bankruptcies the liabilities are estimated at £7,932,520. The assets realised in the year amounted to £1,110,449. There were 4,288 petitions for liquidation by arrangement (a much larger number than the bankruptcies) were filed under the Bankruptcy Act; resolutions of creditors were registered in 2,035 cases; and resolutions for the debtors' discharge in 531 cases. The gross amount of the debts was £6,230,287, and of the estates £2,235,191. Resolutions were registered for 1,616 compositions with creditors; the gross amount of the debts being £3,293,622, and the composition £1,180,753. Here is an amount of property, and of business in comparison with which the amount dealt with at Common Law is trivial, the total amount of debts and damages recovered in a year at Common Law being under £400,000, but in the latter the County Court jurisdiction is limited to small amounts, in the other it is virtually unlimited. It only remains to be observed that it is considered an anomaly in the appellate jurisdiction of the Admiralty, that whereas the appeal from the County Court judges is to the Chief Judge in Bankruptcy, and from him to the Lords Justices, the appeal from the London Registrars, is direct to the Lords Justices. But this anomaly will appear less if it is borne in mind that the London Registrars in cases of any doubt probably consult the chief judge or direct a reference to him, so that in most cases these decisions are mutually to be considered as his. Perhaps, however, the system admits of improvement in this respect, and rather too much power is entrusted to the London Registrars hardly any of whom are lawyers by education, and though they speedily require a great deal of practical experience, are not competent to decide questions of the least doubt.

THE ADMIRALTY SYSTEM.

The Admiralty system is one of great importance, on account of the large extension of its jurisdiction, which has lately taken place, and its capabilities for adaptation to the objects of commercial tribunals. It has the immense advantage of a procedure *in rem*, and a summary seizure of the ship sued. Strictly speaking its proceeding is summary, and should be from day to day, for the sake of mariners and mercantile men, whose affairs are supposed to require speedy determination. But, unhappily, the procedure is not so speedy as it ought to be, entirely through inadequacy of judicial power, precluding that prompt preliminary examination of cases which is essential to speedy justice. In place of this there is first a course of written pleadings between the parties, as in the Courts of Common Law, though not so formal and technical, and this is the more to be regretted as there is a power of remitting cases to referees at the hearing, which might often be well exercised on a more summary hearing. As to the pleading in the Admiralty, although it follows the general course of the Common Law, in that it proceeds by plea, replication, and rejoinder, the proceeding is far more simple and natural than at Common Law, and more approaches in that respect to the Probate or Chancery. The plaintiff proceeds by a petition or "act," setting forth succinctly the facts on which he relies. And the general rule is that he must so far state and disclose his case as to enable the court to judge of the evidence necessary to sustain it, that is of the facts which must be proved or put in evidence. The pleadings are narratives of facts. Objections may be taken to the pleadings in acts on petitions, but great discretion should be exercised before taking such objections. *The Hebe*. 7 Jur. 564.—Ad.

A rejoinder ought not to state new matter of defence, unless it be matter come to the knowledge of the party since his answer was given in; but it may state matter subsidiary to the original defence, when in a reply, issue is taken on that

original defence, and averments made in the reply which require contradiction or explanation. *The Hebe*.—*Ib.*

It is not absolutely necessary to state in an original answer matter subsidiary to the defence there contained ; for, *non constat*, that such matter of defence may be denied in reply, and that the plaintiff ought not to plead in reply matter which ought to have formed part of an original act on petition. (*Ann and Jane*, 7 Jur. 659.)

Application for leave to withdraw an act on petition, for the purpose of amendment, after a copy had been delivered to the adverse proctor in the suit, refused. In a rejoinder, the matter pleaded must be confined to averments, which are responsive to the facts suggested in the reply, or corroborative of the original statement ; but it is not competent to introduce entirely new matter. (*The Aurora*, 1 Rob. 322.)

The great distinctive feature of the Admiralty system is the use of nautical assessors in the hearing of cases, and the reference of cases turning on mercantile matters to the Registrar and merchants who compose a kind of commercial tribunal. As to the former, the Court of First Instance, and the Court of Appeal, have equally the advantage of the aid of nautical assessors, the Trinity Masters, in cases which turn on nautical matters, cases of collision, or salvage, or damage to cargo. Thus, in a case heard in the Privy Council on appeal, the report states* :—" On the conclusion of the appellants' case, their Lordships conferred together, and on the re-admission of the public, the decision, in which their Lordships had been assisted by the nautical assessors, was given. Sir J. Colville, in pronouncing judgment, referred to the circumstances of the collision, and said their Lordships saw nothing in the case for them to disturb the finding of the Court below, and the gentlemen who had assisted them as nautical assessors were of the same opinion. Their lordships would therefore humbly advise Her Majesty that the appeal be dismissed, with costs. Judgment accordingly.

THE PROBATE AND DIVORCE COURT SYSTEM.

The Probate and Divorce Court system is in some respects admirable; it is a Court of Law and Equity; it can try cases by judge alone, or with a jury; it has all the Common Law power of oral examination; its mode of pleading is simple and natural, uniting the best features of Law and Equity, setting forth the matters of fact as in Chancery, but yet with the conciseness of Common Law. But it has a great and radical defect—that is, deficiency of judicial power. Although the assistance of the judges of other Courts can be called in, there is only one judge in ordinary! By that strange anomaly which seems to mark as by fatality all the parts of our judicial system, in this Court, in which, above all others, on account of their being only one judge, the delegation of judicial powers would be most valuable, it is almost absent. This serious defect in the constitution of the Court attracted great attention on the occasion of the retirement of Lord Penzance from ill health, supposed to be caused by excess of work. It was observed in the *Times* :—

“The case, however, depends mainly upon the overloading of a judge with work which ought to be done for him by others; and a remedy seems to be accessible that would either require no appeal to Parliament at all, or, at least, no appeal upon any matter that would need consideration or debate. It is only necessary to re-organize the work of the Registries, and to appoint subordinate officials, of sufficient station and responsibility, by whom the Chief Judge would be relieved of the mass of mere routine by which he has been so long encumbered and weighed down. For such a purpose it is probable that the Government already possesses powers enough, and that the sanction of the Treasury is alone needed for the arrangement. If this be so, the sanction could only be refused by that kind of parsimony which leads those who practise it into the wildest extravagance; for no extravagance is more culpable than that which wastes great powers in the accomplishment of trivial and petty ends. It is easy to imagine the correspondence about details which the customs of the Treasury inflict upon the various Registries; but there can be no possible reason why this correspondence should come under the view of the judge of the Court of Probate. It must be conducted in

strict accordance with certain rules and precedents; and the judge's clerk, rather than the judge himself, would seem to be the kind of person on whom it should devolve to see that these rules and precedents had been adhered to. The arrangement of the business of the Court, in like manner, should be under the supreme authority of the presiding judge when it pleased him to exercise it, but should, on all occasions, be conducted in his name by subordinate officials. The fact that great changes are probably impending over our Courts of Law is a valid reason for avoiding premature or piecemeal legislation; and, besides this, there is a manifest fitness in leaving a certain class of cases, having many common and peculiar characteristics, to the decision of a single judge, whose experience in dealing with them soon comes to be of inestimable value. On both grounds the suggested fusion of the Court of Admiralty may at present be deprecated, but the circumstances furnish no argument against disembarassing the judge of Probate and Divorce of the extraneous work which has hitherto been thrust upon him."

And upon this the following sensible letter appeared in that paper:—

"Any one acquainted with the practice as it at present exists in the Courts of Probate and Divorce must have been much struck with the observations in your leader of Thursday last on this subject.

"It seems hardly credible that, while for years past nearly all the chamber work of the judges of the Superior Courts has been delegated to the Masters of the respective courts, no such change should have been made in the court over which Lord Penzance has so ably presided, and in consequence he has had hours and hours of his time wasted in having to listen to every lawyer's clerk who wanted to ask a week's time to plead, or some other equally trivial application which could easily be disposed of by the usher of the court.

"Why cannot the Registrars of the court take such applications and all ordinary motions and common form business? The anomaly is all the greater, because throughout the Long Vacation, two registrars sit and dispose of all such business to the satisfaction of every one, and if they did so in Term, and only referred cases of importance to the court, the relief to the judge would be very great.

"A quantity of work is also done before the court which is quite unnecessary. If a suitor at Common Law wants a special jury he merely gives notice to his opponent and to the Sheriff, whereas in this court a motion has to be made

and heard before the judge and counsel to be briefed, causing needless expense and trouble.

"These are but a few instances of much-needed reforms, and I am convinced that if our law reformers would only seek the aid of one or two practical solicitors when making changes which are necessary in the procedure of the courts, much benefit would accrue to the public and much trouble be saved."

The amount of labour in the two courts is enormous, and it is well known it presses with great severity upon the judge. There are two courts, each of them with an amount of business which requires at the least one judge, if not more, and there is only one judge between them! It is an absolute scandal and absurdity in our judicial system.

With respect to the Divorce Court system of procedure, it partakes of the nature both of the Common Law and Equity system, that is, it requires a narrative of facts as in Chancery, but it admits of general allegations in well known terms having a definite legal meaning, as 'cruelty,' or the like, and does not allow exceptions on the mere grounds of generality, if the defect can be cured by particulars. Thus, for instance:—

"In a suit for judicial separation on the ground of cruelty, cruelty may consist in the aggregate of the acts alleged in the petition, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant a decree. An allegation of an act relied upon as cruelty is not bad on demurrer if such act could under any circumstances amount to cruelty. An allegation that the respondent was in the habit of using insulting and abusive language to the petitioner in the presence of third persons, is admissible as tending to show the temper and habits of the respondent. A petition by a wife for judicial separation on the ground of cruelty alleged in the fourth and sixth paragraphs that the respondent on one occasion threw a silver spoon, and on another a walnut, at the petitioner, with great violence, and in the eighth that he was in the habit of using insulting language to the petitioner, and taunting and abusing her in the presence of the governess and servants. The respondent having demurred to these paragraphs, on the ground that none of the matters therein alleged amounted to cruelty, the Court set aside the demurrer as frivolous. The ninth paragraph alleged that the respondent was in the habit of beating

and kicking the petitioner, but that she was unable to set forth the particular occasion. To this the respondent demurred, on the ground that he was not bound to answer such vague questions; and the Court set aside the demurrer as frivolous, saying that the generality of the charge was only ground upon application for particulars.*

The first thing to be considered in regard to any court is its procedure, on which must of necessity practically depend its procedure. For no matter how admirable rules of procedure may be, if the judicature is inadequate, if the judicial power is insufficient there must be inconvenience and delay. Now the absurd inadequacy of the judicature of the Divorce and Probate Court can be shown in an instant by judicial statistics. Not above 4,000 cases are sent for trial in the courts of law annually. Not above one in four are tried. There are, therefore, eighteen judges to try a thousand cases annually, or taking off eight for current business, ten judges, each having one hundred a year. This is a rough calculation, but it is sufficient for the purpose. Now what are the statistics of the Divorce and Probate Court, which, be it observed, are two distinct courts each with an enormous business, and with only a single judge? In 1870 there were above 350 cases in the Divorce and Matrimonial Court, and in the Probate Court the business is very large, there were above 1000 grants of probate and above 5000 grants of administration, a large per centage on which were contested. The return of the proceedings in Her Majesty's Court for Divorce and Matrimonial Causes shows that in 1871 the number of petitions filed was 412, being 30 more than in 1870, and 37 more than in 1869. Besides these, there were 12 applications for protection of property, as against 6 in 1870; there were also 97 petitions for alimony, being 77 more than in the previous year. The motions numbered 779 and the summonses 814 in 1871; but in 1870 the motions were 835, and the summonses 828. The number of causes tried was 232, as against 284 in the

* *Leete v. Leete*.—2 Tr. 568; 31 L. J. 121; 6 L. T. N. S. 507.

previous year. There were no appeals to the House of Lords, but there were four to the Full Court. Decrees *nisi* were granted in 191 cases, and 166 were made absolute; in the present year these numbers were 220 and 154 respectively. The fees received amount to £3,948 14s. 6d., as against £2,267 8s. 6d. in 1870. During the 14 years of the existence of this court the number of petitions filed amounts to 4,568, being an average of 326 a year. In the Court of Probate the number of probates granted was 10,263 and of administrations, 5,036; in 1870 the probates numbered 10,177, and the administrations 5,031. The value of the probate and administration stamps issued in London was £1,104,162; the amount in the previous year was £934,078. In the 40 district registries there were 16,895 probates granted, and 7,457 administrations, as against 16,835 and 7,074 in 1870. The amount of fees received in all the district registries was £70,609 in 1871, and £71,559 in 1870, and the amount of probate and administration stamps was £653,469 in the year 1871, and £712,933 in 1870. The total amounts under which property was sworn for the purpose of probates or administrations is represented by an aggregate of £112,178,935 for the principal and district registries.*

One great distinctive feature of this court, in which it resembles the Chancery, is that trial by jury is only prescribed in a certain class of cases, and in others is optional with the parties or in the discretion of the court. No doubt cases constantly occur in which it is seen that a tribunal, like a jury, may be of use, cases in which the facts are short and simple, and the truths depend on the credibility of witnesses on the one side or the other. Such a case was the Godrich case and such a case also was one of the last tried before Lord Penzance, the Firebrace case, both cases of dissolution of marriage on the ground of adultery. The latter was thus described by one of the reporters:—

“The hearing of this protracted and vigorously contested divorce suit, which has occupied the court for nearly three

* *Solicitors' Journal.*

weeks, was resumed and concluded to-day. The whole of the evidence having been concluded on Wednesday, the past two days have been taken up by the addresses of counsel. Lord Penzance now summed up the voluminous evidence which has been adduced in this case to the jury. In proceeding to do so, he remarked that, although the case had been protracted, it could not be said to have occupied more time than the circumstances connected with it and its paramount importance to the parties interested in and connected with it."

The system of the Court of Probate and Divorce is of great interest with reference to procedure, because it has been so lately established by the legislature, and therefore exhibits the latest views of the legislature on the subject. And it is to be observed that the system thus established approaches more nearly to that of Chancery than Common Law. For while, on the one hand, oral evidence may be taken, as in Chancery, cases may be tried without a jury by the judge sitting alone. One great advantage of this is, that it admits of an appeal upon the facts, after a skilled and able judge has on full consideration clearly stated the grounds and reasons for his conclusions upon the matters of fact. Upon a trial by jury there cannot, properly speaking, be an appeal upon the facts, there can only be a new trial. But in the Court of Probate a case can be carried on appeal upon the facts, to the House of Lords. This was done some years ago in a remarkable case of testamentary capacity.*

Such is a general view of our judicial system as it exists at the present time, just before the new judicial system comes into operation, which is designed to redress its evils and remedy its defects, and which we hope may have that effect.

* *Thwaites v. Tibbett.*

LEGAL TOPICS.

THE OPERATION OF THE EDUCATION ACT.—There is a strong reason to believe that the extraordinary reaction against the late Government arose, in a great degree, from their pressing compulsory legislation too rashly and too far. One subject, on which it has been enforced with some strictness, is one of great delicacy as well as one of vast importance, and that is the compulsory part of the Education system. Nothing is of greater delicacy in this country than interference by the Government with the relation of parent and child. Lord Aberdare, in a recent speech, made some excellent observations on the subject. He said: "The system of general compulsion is not to be brought into force rashly or imprudently. We cannot transplant the Scotch system into this country all at once. It has been the growth of centuries." This, no doubt, was most sensible and most true. Everything good must be gradual and the growth of time. Theorists and philanthropists are apt to want to go too fast. But the world will not be driven, and must be persuaded, even for its own good.

PROCEEDINGS IN CASES OF LUNACY.—One of the most important cases determined by the Lords Justices last Term was the case which raised a question as to the proper course of procedure in cases of lunacy. Stated shortly, it came to this, that the proper course is a commission of enquiry, which issues out of Chancery (though it is quite distinct from the ordinary jurisdiction of the court as a Court of Equity) and under which proper care is taken of the interests of the lunatic. All lawyers are bound to know this, and no lawyer can be allowed to pretend that he does not know it, or to suppose that any one can take proceedings at law or in equity in the name of the lunatic, not for his benefit, but for the benefit of the parties taking the proceedings in his name. The result, of course, would be to evade the proper course of procedure and deprive the lunatic of proper protec-

tion of his interests. Yet this course was lately taken in the case in question under these circumstances. The person who became a lunatic was engaged in business, and had an agent who wanted his accounts wound up, and so thereupon, the agent's attorneys, without waiting for a commission of lunacy, actually filed a bill in equity against him in the name of the lunatic! A receiver was appointed, and in December, 1871, the case was heard without notice to the family, and a decree obtained for sale of the stock in trade! On the 17th February, 1872, while the suit was still in progress, a petition in lunacy for enquiry was presented, and in March the man was found lunatic. From that time at all events the "next friend" ought to have discontinued his proceedings, but, on the contrary, he still proceeded in it, and passed accounts and obtained orders for disposing of agent's funds, without notice to the family, or the person having charge of the lunacy proceedings. Nevertheless, it was actually contended that all this was regular and right! The Vice-Chancellor, however, thought otherwise, and it is astonishing that any lawyer could have ever dreamt that the proceedings taken in the name of a lunatic for the advantage of another person could be possibly lawful! If indeed the chief clerk entertained any doubt upon it, then it only shows that we were right in asserting, in our Paper on our Judicial System, that it was a fatal error to abolish the masters and substitute these inferior functionaries, generally attorneys, rarely good lawyers, and without the requisite judicial weight or authority. And if, indeed, counsel advised that the proceedings could lawfully be continued, so much the worse for the Bar; and it only shows we are right in our views as to the sad decline of the Bar in knowledge of the law. Of course the Lords Justices held the whole proceeding utterly irregular, and unlawful, and set them aside. No competent lawyer could entertain a doubt about it, and if any one did, the powerful and vigorous judgment of Lord Justice James would set aside all doubt for ever. It is a most masterly exposition of the law on the subject, and

will, at once, be an enduring monument of his judicial style, and render the decision a leading case on the subject. Our friend, the *Law Times*, who, on every subject, leans to the attorney view, encourages an appeal, and expresses sympathy with the attorneys, but, with every respect for our contemporary, the appeal is hopeless. The decision is invulnerable and his sympathy with the attorney entirely misplaced. They had a plain course before them which would have secured all interests, and avoided all risk. Why did they not pursue it? Plainly, as the Lords Justices observed, because they desired the carriage of the proceedings. Otherwise the family attorney, by filing a petition of enquiry in lunacy, would have answered every object. The other attorneys thought proper to assume to act on the part of the lunatic without authority, and most justly had to pay the penalty. What possible pretence is there for sympathy?

CARELESS TEXT BOOKS.—During the discussion in the Court of Queen's Bench, as to the power of the court to adjourn a criminal trial for the purpose of obtaining further evidence, one of the Judges read the following passage from *Archbold's Criminal Pleading*, (p. 145, 14th Sect.) "Adjournment of trial.—Where the witnesses for the prosecution have all been examined, the judge may order the court to be adjourned, and direct another trial to be proceeded with in order to give time for the production of a thing essential to the proof deposited at a distance. *R. v. Wenborn*, 6 Jurist, 267. And on a trial for murder before Maule, J., at York, 1848, after the opening address of the counsel, it was discovered that in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury were locked up, a fresh jury was called into the box, and another case was proceeded with." *R. v. Foster*, 3, C. & K., 201. Now will it be believed that in neither of these cases was there any adjournment at all; but merely a temporary suspension of the trial for an hour or two; the prisoner being carefully kept in the dock.

in order to mark more clearly that there was no adjournment, but that the trial was still going on; all the judges being of opinion that there could be no adjournment for such purpose, and no adjournment having ever taken place in a criminal trial, except for necessary rest, and from actual physical necessity. In the one case the trial was suspended for an hour or two where a document, accidentally left behind in the assize town, was being fetched; and in the other case the same course was taken to allow time for the arrival of a witness accidentally delayed by the lateness of a railway train. That, as in both cases there was a very "brief" suspension of the trial on account of *an accident*, and in no other case was there any adjournment at all. In a note to the report in the *Jurist* attention is called to this, and it is stated that the same course is frequently taken at the Old Bailey. So that even although there was no adjournment, the propriety of a suspension of a trial was doubted, and Mr. Justice Willes and Mr. Justice Wightman denied it. (*Re Tempest*, 1 Foster and Finlason, *Re Fitzgerald* 3 Foster and Finlason) and it was even denied in civil cases, prior to the Common Law Procedure Act, 1854 (*vide* Finlason's Common Law Procedure Acts). Yet we have it stated, in Archibald's Criminal Practice, edited by Welsby that it was settled law that a criminal trial might be adjourned in order to obtain evidence, whereas all the authorities clearly show that a trial could not be adjourned, and could only be suspended for a portion of a day, on account of accident, and that even this was always doubted. This is the way in which text books are edited, even those which bear the names of eminent men. The truth is, however, that such men are often just those who have no time to edit books, and have to leave the editing to pupils or young assistants. Thus it was with men like the late Mr. Welsby, whose practice was enormous, and could not afford time to edit books. The publishers got a great name, and that was enough to secure the book a good sale, but in truth, the book was edited by some young man

who did not know enough of law to know the distinction between a suspension of a trial and an adjournment, and so he abstracted the case according to his own erroneous ideas upon the subject. This is how an enormous quantity of loose or bad law get into the minds of men, and when it is once in their minds 'it is difficult to get it out of them, and this bad law gets at last confirmed from the bench.

LEGAL REVIEWS OF WORKS.

MAYNES' TREATISE ON DAMAGES. By Lumley Smith.—This is the second edition of a work on the subject of which, as the author avowed, is one of equal difficulty and importance. Most actions being for recovery of money, in the majority of cases, as damages, the question, if one of law, as to damages goes far to settle the amount to be recovered, and then to determine the practical result of the action. Damages, therefore, form the most practical part of the law of actions or legal remedies. "Damages," says the author, "are the pecuniary satisfaction which a plaintiff may obtain by success in an action." "They may rise to almost any amount, or they may dwindle down to any merely nominal sum."

"They may be governed by rules so strict as to enable the judge to dictate their amount as a matter of law, or they may be left with loose limits almost entirely to the jury. It becomes then a most important enquiry to ascertain the principles on which they are measured, and the species of evidence by which they be aggravated or reduced." The author then proposed "to examine the rules by which damages are measured, the practice as to the assessment of damages, and the cases in which the Court will review the decisions arrived at by a jury."

This latter is the most important head of all, and by far that one of which all the rest practically arises, for it is the exercise of the Court's assumed power to review the decisions of juries as to damages, which has created all the "rules" on the subject. We say "assumed" for the whole jurisdiction has been gained by usurpation, and the course and progress of the usurpation can be clearly traced, as a matter of legal history, since the Revolution. Nay, it has been largely advanced within the last thirty or forty years, and has almost, indeed, in its present form been created within living memory. By law, the juries are *absolute* in

damages; as old judges used to say, the "juries are *chancellors* in assessing damages;" that is, they could take equitable considerations into account. And it was clear law, even within living memory, that their verdicts could not be set aside as to the amount of damages, unless on the ground of downright misconduct,—that is, in giving only a shilling for a grievous injury; or, on the other hand, in giving such gross excessive damages as no honest and sensible men could possibly have agreed in awarding. As to cases of tort it was not from all to give any rules of law, and as to contracts the only rule that could be laid down was that the jury were to give damages for the natural consequences of the breach of contract. The jury were not only the best but the only possible judges as to what were natural and reasonable consequences of a breach of contract. The judges, however, desirous to introduce as much certainty as possible into this branch of the law, tried to lay down and apply more precise rules. But then these only introduced fresh difficulties and continual differences in judicial opinions upon questions really dependent on matters of fact and business with which judges were very little acquainted and very ill qualified to deal. And as the application of rules must after all be left to the jury, and their verdicts could only be altered through the cumbrous and costly process of a new trial, the remedy was often far worse than the imaginary evil it was to redress, the result was an unusual accumulation of cases, which we see collected in this work, and which are stated with the utmost fullness, care, and correctness. And, no doubt, these cases afford a great deal of very valuable guidance as to the probable practical result of an action, and must very much tend to assist practitioners in their judgment. Mr. Lumley Smith has performed his task as editor with great care and has introduced all the new cases down to the time of publication—the Long Vacation of 1872. The author has noticed American as well as English cases on the subject, and the American decisions often afford the only judicial guidance that can be gained upon a question. Thus, for instance, as to the damages to be allowed for the recovery of land from a purchaser, for failure of title, where the damages are the entire value of the estate. The author says: "Then arises the question—how is the value to be calculated? is it to be the value at the time of eviction? I am not aware of any English case in which a rule has been laid down on the point, but it has formed the subject of frequent discussions in America. And then the American cases are stated, from which it appears that the judicial decisions conflict as to whether the value of

improvements on the land should be allowed. It was inevitable that they should conflict, for they involve matters of mere opinion, and, moreover, the practical application of any possible principle on such a question must depend upon the cases in each case; as, for instance, whether the improvements are such as were natural and reasonable, or were mere fancy improvements, or arose from accidental causes. This appears to have been the author's opinion, and it is reasonable and just; but then the practical application in each case must be for the jury. Still, the judicial discussion of the subject in the various cases that have arisen, must tend to enlighten the legal mind on the subject, and to enable it to form a sound judgment upon it. And the real value of such a book is, that it contains a vast number of cases that have actually arisen, and have been made the subject of judicial discussion and decision, aided in every instance by the opinion of practical men in the form of verdicts of juries, and the result of the whole is a body of enlightened and instructed opinion on the subject which must be very valuable to practitioners or students.

A TREATISE ON THE LAW OF CARRIERS (of goods and passengers). By J. H. Balfour Browne.—There were already, as Mr. Browne mentions, with becoming frankness, in his Preface, more than one work on the law of carriers, but for various reasons, which, with modesty, he states, he thought there was room for another. One of these is the rapid development which the law on the subject has lately reached, especially with reference to railways, and conveyance of passengers by railway, and when the law on any subject has reached a rapid stage of development and extension, there are obvious reasons in favour of a new work upon it, rather than new editions of an older book. It is difficult, in the form of notes or additions to work in the new matter on the frame of the original work, and an author feels freer and less fettered in the plan of his book and the use of his materials. On the other hand there is, of course, scope for greater ability in the construction of an original work, and we may at once say that Mr. Browne is certainly not deficient in ability. He shows a capacity for grasping principles and tracing out in their practical application. The author observes, truly: "The importance of any department of law is in direct proportion to the importance of the interests affected by it. The relative importance of various legal questions has, consequently, varied with its varying conditions of civilization." And hence he deduces the importance of the law of carriers. As regards the present treatise, the author says: "Some parts of the

subject have received a greater degree of attention than others, because the author found that the statement of the law in other text books was sufficiently adequate, while he has bestowed greater attention upon those questions which had received inadequate answers in other books upon the same department of law." The author, in the first chapter, discusses the principles of the law of bailments. In chapter ii., he treats of carriers without hire. Chapter iii., Carriers for hire, who are not common carriers. Chapter iv., who are common carriers. Chapter v., of the common law duty of carriers to receive goods. Chapter vi., of the common law duty of carriers to convey and deliver goods safely. Chapter vii. of the restrictions on the liability of common carriers by statute or special contract. Chapter viii. of delivery and non-delivery. Chapter ix. of restrictions upon carriers. Chapter x. of the rights of carriers. Chapter xi. of carriers of passengers. Chapter xii. of actions by or against carriers. Finally, there is an appendix, with introduction to pleading and forms of pleading. Throughout the work the cases are clearly and carefully stated down to those which are most recent, and including the American cases on the subject. There is also a constant endeavour to render the law on the subject clear and intelligible even to laymen. The principles upon which the law is founded, says the author, are those of common sense, and in this belief he always strives to take a common sense view of the law. The work is most copious upon those heads of the law which have acquired most recent development; for instance, as to railway companies, and as to passengers. The chapter, "Restrictions on Carriers," contains about 150 pages, and the chapter as to "Carriage of Passengers" about as many; and the chapter as to "Limited Responsibility of Common Carriers" is very full, containing about 90 pages, while the last and most practical head, "Actions by or against Carriers," comprises with the Forms nearly 150 pages.

Some passages in Mr. Browne's work lead us to suppose that he intended it for laymen, not less than lawyers; certainly the clearness of its style and arrangement render it, perhaps, the best book of the kind for that purpose. He says, "the principles upon which all laws are founded are those of common sense, and thus, therefore, it is within the power of each man by ordinary intelligence to understand what his duties are." He says, "that unless laws have been formed with regard to the customs and habits of mankind, they are bad;" but, he intimates that this is not the case with the law of carriers, and he, again and again, speaks of it as "in accordance with the common sense of the customs and habits of mankind." We fancy some recent

decisions as to railway accidents must be taken as exceptions from the rule, but certainly Mr. Browne's exposition of the law on the subject is clear and easy of apprehension; in his statement of the cases upon a question, he is clear, copious, and correct. If here and there there is a little looseness of expression it is only in some preliminary observations or general remarks. Mr. Browne says he found some branches of the law inadequately stated in previous works, probably those of more recent growth and development, and he has sought to bring these out more fully and copiously; and he has certainly done so. Mr. Browne especially mentions in his title page "references to the most recent American decisions," and, in his preface, he speaks with high approval of Mr. Angell's work on the subject, and says he has introduced many leading American cases not to be found in that book, especially those which are more recent. These cases no doubt add to the value of the work for American authorities are not so accessible to our practitioners, as English cases are. Generally speaking, the cases on the subject are brought down to the date of publication, which was October, 1872. We are bound in homage to critical truth to say that in the latter part, as to pleadings and evidence Mr. Browne falls into one or two errors; as to pleadings, for instance, in forgetting that the Common Law Procedure Act does away with actions on promises unless where the action requires an actual contract; and as to evidence, in confounding (at p. 528) evidence of agents with evidence as to statements by agents: a very different thing. But these, with a little looseness of expression in one or two preliminary sentences, are the only faults or defects which appear to us to require notice; and, on the whole the work is creditable to Mr. Browne as a man of learning and ability, and will be found by laymen or students a very clear and complete exposition of the law on the subject.

WINSLOW'S MANUAL OF LUNACY.—This is a handbook relating to the legal care and treatment of the insane in the public and private asylums of Great Britain, Ireland, United States of America, and the Continent. It is by Mr. Lyttleton Winslow, a son of Dr. Forbes Winslow, whose long experience in the subject is so well known, and who very naturally, and in the very excusable pride, introduces his son's work to the world. He says he believes "the book will be of great value as one of reference to lawyers, as to all persons associated with lunatic asylums and interested in the legal care of the insane." He hopes that the work will fill a gap in medico-psychological literature. No medical practitioner, having access to it, can for the future plead

ignorance of the law as an excuse for its violation, as he will find here clearly specified everything he is required to know in regard to the legal confinement of persons alleged to be of unsound mind." Thus, in its legal aspect, it is of great practical utility, no doubt, to the members, both of the legal and medical professions. But it contains a great deal which renders it a work of much interest to the public. The reader, says Dr. Winslow, will find in this manual, valuable statistical facts relating to the insane in this and other countries, with an account of the principle asylums. We may here remark that from the statistics it would appear that lunacy is rapidly increasing in this country, but we strongly suspect from cases that have come before courts of law, and also some that have come to our knowledge from private sources, that the reason of this apparent increase is the frequency of seclusion of persons by their relatives from interested motives. Against this evil no official inspection is of the least avail, and there is no security but the ancient one of enquiry by a jury. Nor should any one be allowed to be permanently confined without such enquiry. In this book will be found ample illustration of this, and is its most important feature. The author has briefly indicated the course to be pursued should it be necessary to petition the Chancellor to issue a writ *de lunatico inquirendo*, in order to enable the court to protect and administer the property of insane persons. And, in the recent remarkable case of *Beall v. Smith*, the vigorous and masterly judgment of Lord Justice James expounded the necessity for such an enquiry in order to authorize any proceedings in Chancery as to property. But the enquiry, unhappily, only had reference to persons with property, and the majority of cases are dealt with summarily, and without an enquiry by jury. Yet, as Sir James Hannen lately observed, in an able judgment on the subject, eccentricity often approaches very near to insanity in its appearances, and yet is very different; and there is reason to believe that persons are often incarcerated upon mere pretences of insanity. In the final chapter of the work there is an exposition of the various forms of lunacy or eccentricity, from idiocy to mere melancholy or temporary derangement, and this is, perhaps, the most interesting portion of the book. It is especially interesting with reference to the question how far the existence of insanity is a medical question at all. The true legal principle is that it is never so, but that it is a practical question of fact to be determined by men of ordinary intelligence from their judgment of the words, acts, and conduct of the person. This was the view taken by the House of Lords in *Earl Ferrer's* case, and the departure from it, in our own time, has led to the most enormous

evils, one of which is the apparent increase of lunacy, and the easy seclusion of persons as supposed lunatics, and the easy impunity of criminals under pretence of a lunacy which rarely exists. This defence is now always set up, in the absence of any other, in cases of murder, especially if of any atrocity, or if the murderer has had the sense to veil his motive in secrecy. The very atrocity of the crime and the absence of apparent motive are then made the evidence of insanity, and so the worst murderers usually escape by the aid of medical "experts." But they have no right to be heard on the question at all, as the existence of insanity is not a medical question, though its causes may be—where they are physical—and in such cases its cure of course is also a medical question, but it is clear from this book that insanity is not always nor usually the result of physical causes or disease. And even whether it is or not, the prior question is whether it exists; and that really resolves itself into this, whether the person speaks and acts as no rational person would do. And surely that is eminently a question for a jury, and is not a medical question at all. Yet the whole scope of the Lunacy Act is to make the question medical, and to place the liberty of every person at the mercy of any one who is interested in getting a couple of medical men to certify to insanity. This is a most scandalous and dangerous state of the law, and we are satisfied that numbers of persons are secluded under the false pretence of insanity which does not really exist. There are certain portions of this book, in which the medical view of insanity is given which strangely conflicts with the legal view, that is, the view of practical sound common sense, and strongly confirms the impression we entertain as to the vicious and dangerous state of the law. But the book is well written, and contains a vast deal of interesting information, that is of mania, acute, chronic, or recurrent; monomania, melancholia, acute and chronic; dementia, acute and chronic; imbecility, idiocy, kleptomania, delusions, hallucinations and illusions, delirium, dipsomania, homicide, and moral insanity, periperal insanity, general paralysis of the insane, feigned insanity, and medical evidence in court. It may be gathered from the heads of this, the most interesting chapter in the work, that it is written rather in the medical than in the medico-legal view, and it may be said of the whole work that it is written rather in the view of the medical practitioner who may be called upon to take part in the administration of the law as to lunacy, than either in the interest of the public generally or of the legal profession. But it is not the less interesting on that account to all classes of the community; and, though it is to be borne in mind, in reading it, that it is written by a lunacy doctor, and the son of

one who is celebrated in that capacity, it is certainly the best book on the subject that has been published for the purpose of general information on this painful but deeply interesting subject. The contents of the work are very varied and interesting, and in style it is easy and clear. The first chapter gives a history of lunacy legislation; the second gives the present state of lunacy in this country; the third gives an epitome of the Lunacy Act; the fourth, treats of the management of asylums and licensed houses; the fifth treats specially of private patients; the sixth of single patients confined in unlicensed houses; the seventh of pauper lunatics; the eighth of commissions on lunacy and chancery patients; the ninth, of St. Luke's and Bethlehem Hospitals for Lunatics; the tenth, of liabilities incurred by those concerned in the confinement of persons alleged to be insane, (in which, however, we miss some of the most remarkable and recent cases, as *Ruck v. Stilwell*, and others); the eleventh and following chapters of lunacy in Scotland, in Ireland, in France, in Belgium, in Germany, in the United States, and in Russia; the eighteenth treats of recent lunacy statistics and instructions; the nineteenth of definitions and explanation of terms.

THE LAW OF TRADE MARKS. By H. Ludlow and H. Jenkyns.—“The principal object of this work,” says the authors, “is to afford a practical treatise on a branch of law of continually increasing importance, and every effort has been made to adapt it for the use of the practitioner engaged in actual business.” It aims at the same time “at taking a scientific view of the subject.” In pursuit of this object they examine the ground of the law on the subject, and they adopt the view that it is property and not fraud, although all the earlier cases they admit proceed upon fraud. In their preface they state that “the English law on the subject is the fruits of the law of Scotland and the United States;” but surely this is an error, unless it is meant of their own view, the recent view of the law. For, as to Scotch cases, they admit that there are hardly any; and as to American, it is certain that they were founded on our own. The law on the subject has been developing in this country ever since the times of Hardwick, and can be traced clearly back to the 17th century as a branch of the law of fraud. And our law about it was firmly fixed and established long before there were any American cases at all. In the reign of James I. an action was held to lie by one clothier against another, who put on his clothes the trade-mark of the plaintiff, whose clothes were superior to his own. Popham, who reports the case, expressly says that the action was by the clothier whose mark was used.

This case the editors admit was "frequently referred to;" and though they add that "it does not seem to have influenced subsequent decisions," the truth is that it contains the whole law on the subject. It is based on that right to a man's reputation, which is the ground of the action of slander. It is the converse of that action, and is founded only on a different mode of injury. In one it is by falsely stating that another makes things dishonestly or badly; in the other, it is by falsely representing that inferior things are his, in order to rob him of his business by means of his own reputation. In both cases his reputation is injured, and he is deprived of his reputation or business. This surely is hardly a right of property in the strict sense of the term, though it is certainly a right. It is otherwise peculiar process or production such as may be the subject of patent or copyright. These are property, and so of the marks by which they are denoted. But the marks by which a man's goods or works are known in the market are, it is conceived, only incident to reputation. The first chapter is devoted to the "definition and value of a trade mark; the second, to the Common Law remedy for infringement; the third, to the remedy in Chancery. The cases on the subject are clearly and succinctly stated in three sections. Then in chapter iv. the authors deal more fully with the question: "What is a trade-mark?" Then in chapter v. they discuss "the acquisition and transfer of a trade-mark," which, of course, rests on the view that it is property. Then they proceed, lastly, to consider what is an "infringement of a trade-mark." Under these heads the cases are stated clearly and succinctly, and in a manner perfectly satisfactory to lawyers, and equally intelligible to laymen. In an appendix the Merchandise Marks Act, 1862, is added, with the law of the United States, France, and other countries, on the subject. Altogether it is an excellent manual of the law on the subject.

A COLLECTION OF REPORTS OF CELEBRATED TRIALS, CIVIL AND CRIMINAL, Edited with introductions and notes. By Wm. Otter Woodall, Attorney-at-Law, vol. i. London: Shaw and Sons.—"My object," says Mr. Woodall, "in preparing this volume of reports is simply to present for the use of the profession generally, in a convenient form, a collection of the most important and interesting trials of modern date." Nothing is said as to the probable extent of the work—this being vol. i.—nor as to the contents of future volumes. The present volume contains the trials of Thornton for the murder of Mary Ashford, in 1817, and the trial of the "appeal" in the same case, reported in Barnevall and Alderson's reports; the trial of Josiah Phillips

for a libel on the Duke of Cumberland, arising out of the *Sellis* case; the trial of *Smyth v. Smyth*, arising out of the claim of the convict *Provis* to the estates of the *Smyth* family; the trial of the Rev. *Wm. Bailey* for forgery in 1843; the trial of *Tawell* for murder, in 1845; and, lastly, the trial of *Leotade* at *Toulouse* in 1848. This latter case, Mr. Woodall says, is, he believes, first published in an English form, and is, he adds, very little if at all known in this country; but, we believe, it has been made very generally known in Mr. Fitzjames Stephens's "View of the Criminal Law." The trial, however, is very fitly inserted in the present collection "with a view of affording a comparison between the French and English system of procedure." As an instance of curious circumstantial evidence, Mr. Woodall adds, "the case possesses in itself a considerable amount of interest, and is, besides, remarkable for having given rise to more controversy than any criminal trial that has taken place in France since the trials of *Calas* and *Lesurques*." In this respect it resembles the case of *Thornton*, which was a case of a similar character—rape followed by murder; and in both cases the evidence was circumstantial, with this enormous difference, that in *Thornton's* case the evidence was terribly strong, while in the French case really none at all, and an English judge would probably not have allowed them as to be put in peril on such evidence. But, as Mr. Woodall truly observes, the French trial took place under circumstances of fearful excitement and prejudice, which entirely prevented a fair trial, and indeed rendered the trial a mere outrage upon justice. The unhappy man, convicted and sentenced to the terrible sentence of penal servitude for life, soon sunk beneath the severity of his sentence, and in his last moments solemnly asserted his innocence, which no one in his senses can doubt. The trial is a frightful instance of the power of prejudice; and it is also an illustration of the French system, as *Thornton's* is an illustration of the English. In the one an innocent man was convicted; in the other a man whom there is too much reason to believe was guilty, escaped conviction. This escape excited the utmost indignation, for the case was one of peculiar atrocity. It was of the same character as that of the *Eltham* murder, which probably will be included in a future volume. It is impossible to find a case more illustrative of an English judicial system, or exhibiting a more remarkable contrast to the French. The spirit of the English system may be embodied in Lord Hale's maxim, "it is better than a guilty man should escape than that an innocent man should be convicted." This humane maxim was repeated by Mr. Justice Holroyd to the jury at the close of his summing-up

in Thornton's case ; and a comparison of that summing-up with the French President's in the case of Leotade will illustrate most vividly the difference between the two systems. The case of *Symth v. Smyth*, like *Tichborne* case, was a claim to a baronetcy and an estate of £20,000 a year, and the counsel for the claimant was Mr. Bovill, who, as Lord Chief Justice, tried the *Tichborne* case, and the judge who tried the case was Mr. Justice Coleridge, father of the Sir John Coleridge who was counsel against the claimant, and has recently succeeded Sir Wm. Bovill as Lord Chief Justice. The trial ended in its being proved that the claimant was a returned convict : he was convicted of forgery and sentenced to twenty years penal servitude. The case is one of very great interest, especially since the *Tichborne* case. The case of the Rev. William Bailey—who was convicted of forgery—resembles that of Dr. Dodd ; for they were both popular preachers. Happily, however, our criminal code had been in our time mitigated, and Mr. Bailey escaped death. The case of *Tawell* we all remember. It will be seen that the contents of the volume are of very unequal interest, and the cases cannot be said to have been well chosen. Neither are the reports skilfully edited, nor in such a way to give the reader a clear grasp of the nature of the cases, and the effect of the evidence. Nevertheless, with all these drawbacks and defects, the work is one of some interest.

LAW AND PRACTICE OF BANKRUPTCY.—By Registrars Roche and Hazlitt, (Second Edition). This is the work of two of the Registrars, and to that, perhaps, may be traced the plan upon which it has been written. The authors being assistant judges of the Court may have been careful to commit themselves to any propositions of law, or practical directions, which might possibly fetter them in the exercise of their judicial functions, and they therefore have preferred, as far as possible, to set out the statutes and rules, and quote the cases relating thereto ; and are careful not to commit themselves to any particular view or construction on any question admitting of doubt, though their great judicial experience has enabled them often to lay down a clear construction, or give plain directions as to the course to be pursued. The plan they have followed is first to detail the Bankruptcy Act, of 1869, quoting under each section, the cases decided upon it, and incorporating the Bill of Sales Act, *in extenso*, then in like manner comes the Debtors' Act of 1869, and the Absconding Debtors' Act, and the Courts of Justice (Salaries and Funds) Act, which with forms, &c., amount to 352 pages. Then there is a section of the work in which the practice and procedure to

adjudication, and the procedure to liquidation, and under Debtor's summonses, with the recent cases at length, and this occupies about 160 pages. Then the court's tables of costs, the places, and the forms, fill up the remainder of the work, (730 pages), except the index, which is very copious, and occupies about 100 pages more. The bulk of the book, therefore—all but 100 pages out of nearly 840—consists of the text of statutes, forms, and rules, with a full statement of cases decided relating thereto, and for the most part decided on the Acts or Rules of 1869. It is probable that practitioners could hardly have a safer guide as to the practical course to be pursued in any proceeding under the Bankruptcy Law; the authors keeping clear of all matters of doubt or controversy, and keeping close to the provisions of the Acts, the letter of the Rules, and the judicial decisions as to their construction and effect.

THE INCOME TAX LAWS. By Stephen Dowell, Assistant Solicitor of Inland Revenue.—That the income tax is likely to be permanent is apparent from the long list of statutes, by which it has been renewed, even since its imposition, in 1843, thirty-two years ago, by Sir R. Peel. The author declares that it is the most important of all our taxes from its productive power, and we are afraid this will be deemed a reason for its retention. That being so, it is well that the Acts relating to it should be collected into a volume for convenient and easy reference by those who are entrusted with its assessment, its collection, or its enforcement. And the work could not have been better executed than it has been, by one of the able legal officials, who, of course, are practically associated with the details of the machinery by which the Inland Revenue is levied and collected. The different enactments on the subject are elucidated in a very clear and simple manner, by notes containing short statements of the effect of judicial decisions upon them. The cases for instance as to the right of tenants to deduct income tax are very clearly given, as so as to deductions in other cases.

BIOGRAPHICAL AND CRITICAL ESSAYS. By A. Hayward, Esq., Q.C. Lawyers, above all other men, require mental recreation, and no class of men more appreciate the pleasures of literature. And no living writer has done more to supply choice and varied literary entertainment than one who is himself a lawyer, and is also one of the most accomplished writers of his age, we mean Mr. Hayward. These essays of his, the flower of his contributions to periodical literature, are really most delightful composi-

tions. Ever fresh and lively, we never tire of reading them; and we hail their re-appearance as old favourites. They unite every possible attraction, and are lively and amusing, yet with all the truth of history; full of anecdote, story, and curious incident, and all as accurate, as brilliant, and piquant. For it is one of the characteristics of Mr. Hayward's writing that he is as accurate as he is elegant and entertaining, and there is no writer of the day who unites more critical correctness with such liveliness and brilliancy. Moreover, he has, it is easy to see, read and thought much on the subjects which come within the scope of history, and though he does not obtrude his opinions, and they are always expressed briefly, they are always just and sound, and marked by great good sense. Among the subjects of the present volume are the British Parliament, its History and Eloquence; Curiosities of German Archives; "England and France, their national qualities, manners, morals, and society"; "Lanfrey's Napoleon"; "Vicissitudes of Families"; Lives of the Lord Chancellors of Ireland." In the first Mr. Hayward traces in the most attractive way, with copious store of anecdote, and illustrations, the course of Parliamentary history from the age of the Tudors to the reign of Victoria, from the time of Sir Thomas More to the days of Palmerston and Peel. The first article may be described as the History of Parliament in the form of anecdote. And Mr. Hayward, frankly says:—

"Why might there not be an anecdotal History of England, in which the salient points should be placed in broad relief by memorable sayings, and striking anecdotes, by well chosen traits of valour, virtue, patriotism, eloquence, and wit? There is no pleasanter mode of conveying knowledge, no surer mode of durably impressing it. The most fugitive attention is caught by anecdotes, the most volatile mind retains them so long as it retains anything, and none but the shallowest will miss the moral they point, the reflections they suggest, and the conclusions they justify."

Such is the character of Mr. Hayward's *Essay on the British Parliament, its History and Eloquence*, which teems with interesting incident and anecdote, from the earliest times to the present, and tells the history of Parliament in a light, pleasant, picturesque way, well calculated to attract persons and impress everything on the memory. Yet it is correct as the work of an accomplished student of history, and one who has had the education of a lawyer, and it is accurate as it is picturesque and entertaining, and while the reader fancies he is only being amused he is in reality having his memory refreshed in a delightfully agreeable

way by the accomplished writer who has beguiled the hours, so delightfully and refreshed his wearied mind. Thus, in a few clear sentences, the result of much research, an accurate impression presented by the "Commons" in Parliament as they started and as they stand—

"The obscure and unhonoured state from which they emerged, reveals the 'dirt and seaweed whence proud Venus rose.' The burgesses were summoned solely to vote subsidies. They prostrated themselves like slaves before the crown. They crouched like menials and bent uncovered like vassals owing suit and service before the lords. They received wages from their constituents. The right of representation was regarded an oppressive burden, from which the smaller boroughs frequently petitioned to be free."

All which is historically true, and is illustrated by many an amusing anecdote, and might be by many more, and even, in our time, for Mr. Hayward says, with equal truth—

"The corruption of members of Parliament in the last century by open bribery, was, it seems, as common as the corruption of constituencies by bribery in more recent times. Unfortunately, the inherent corruption or perversity of human nature is such that it has proved so difficult to convince the people at large of the wickedness of selling votes as of killing a pheasant or a hare. In some of the largest constituencies, Liverpool for one, at the last general election, independent electors might have been bought by the hundred at five shillings a head."

And we have seen still more recent disclosures of corruption at the late elections. Speaking of bribery to members, Mr. Hayward says:—

"Mr. Massey has found no trace of it, after the Grenville administration. Up to that period, he says, money was received and expected by members from the minister whose measure they supported, apparently without any consciousness of infamy, very much in the same manner as the voters in certain boroughs. After mentioning the power of parliamentary votes in the middle of last century, Mr. Hayward goes on to say:—

"The latest of these pecuniary bargains, those which come nearest to our time, were no longer conducted by the leader. They fell within the province of the patronage of the Secretary of the Treasury, or 'whip'; and though the boldest would hardly now risk the offer of a bank note, it would be an hypocritical affectation of party to assert that modern legislators are no longer open to a bribe. The Secretary of the Treasury in Lord Grey's administration used to boast that he had promised between 250 and 300, peerages, or promotions to the peerage, besides baronetcies, to ensure the passing of the Reform Bill. And it is related to the credit of a successor, that on a discontented supporter objecting to the ministerial policy in his hearing, he took him aside, and asked him bluntly, 'what do you mean?' The late Charles Butler used

to say that the votes of O'Connell's original 'tail' might have been had for £10 a vote, or £200 the session, provided the money was laid before them in gold."

And this in the Reformed Parliament. And by the very men who used to pass bills against bribery at elections!

The article is a history of parliamentary oratory. In our Parliament, observes Mr. Hayward, the ages of oratory follow in unbroken succession. Sir Thomas More's wit, readiness, and eloquence were invariably recognized by his contemporaries. Of a saying of Lord Bacon, it was said, 'The fear of every man that heard him, was lest he should make an end.' Clarendon's pages teem with proof that the period included in his history was marked by debating ability of the highest order. The leading speakers were earnest, plain, and practical, rather than 'rhetorical and declamatory.' No one spoke more powerfully though plainly than the murdered king, and Mr. Hayward gives some specimens of his 'dignified eloquence.' He also gives specimens of the grand yet touching eloquence of Strafford—in his last pleading for his life. Passing in review the eras of the Restoration and the Revolution, Mr. Hayward observes, that there are no remains of the speeches of Lord Somers, nor does it indeed appear there was anything in his speeches to care for. It was otherwise of Lord Bolingbroke, for one of whose speeches Mr. Pitt so earnestly yearned. But then as he dictated his writings, it is probable, as Mr. Hayward observes, that his works much resemble his speeches. Mr. Hayward then passes on to Walpole and Pitt, and then comes to Burke, whom he describes as indisputably the greatest of modern orators. Then he comes to Pitt and Fox, and then to the long "cycle of epoch," as he calls it, of Lord Palmerston, who as he had seen Pitt and Fox, and was known to those who are now living. He divides the Palmerstonian era into three eras, taking Canning, Brougham, and Plunket for the first; Sir Robert Peel Lord Derby, and Shiel for the second; Mr. Disraeli, Mr. Bright, and Mr. Gladstone for the third. "Plunket," he says, "was never surpassed as a debater. He often rose without effort to the loftiest heights of oratory." In another article on "the Lord Chancellor of Ireland," Mr. Hayward comes again upon Lord Plunket, and his description glows with the fervour of his admiration for that consummate orator. Neither Grattan nor Curran, he says, equalled Plunket in the combination of chasteness, and purity, with splendour, intensity and power. It was the opinion of Sir George Lewis, he adds, "that Plunket came nearer to Demosthenes than any modern orator." The article on "Curiosities of German Archives" contains specimens of curious and whimsical illustrations of German life and manners

of the last two or three centuries, taken from a collection of old records, which may, says Mr. Heywood, be often consulted with advantage, whether the object be to verify a disputed point in history, to throw light on manners, to gratify a taste for the wonderful, or to find new proof of the adage that "truth is stranger than fiction." "The Essay on England and France: their Natural Qualities, Manners, Morals, and Society," is a very brilliant article on a subject, on which Mr. Hayward is one of the few men qualified to write, evidently well acquainted with French and English society, literature, and the best society in both countries. In the course of the essay, alluding to the decline of conversation, he observes, "Lord Grenville used to say that he was always glad to meet lawyers at a dinner party, because he then felt sure that some good subject would be rationally discussed." Lawyers have degenerated, however, says Mr. Hayward, since then, for now there is in all societies a decided want of "good talk." "The Essay on Lanfrey's Napoleon" is a terrible exposure of the first Emperor, of which the text may be taken to be this sentence: "What man, since the creation of the world, has combined so much that is mean, petty, wicked, and reprehensible, with such lofty ambition, such comprehensiveness of view, such grasp of mind, such superhuman energy, such versatility and universality of genius and capacity." The scope of M. Lanfrey's work is, as Mr. Hayward says, to disabuse the public mind of a cherished error as to the greatness of the great Emperor, and to show that he was morally mean and mentally very much overrated; and Mr. Hayward does not conceal that he heartily concurs with his author. The article is an eloquent protest against the "modern school of hero worshippers, whose sole pretention of merit is success," and with whom the means are little or nothing, the results everything. The article is a skilful dissection of Napoleon's character and career. The conclusion reached is that the effect of his sustaining self sufficiency combined with his astounding energy and activity was to allow no independent field for action or development of any high order or capacity or talent. The race of court functionaries were stunted in their growth, morally and intellectually. The eminent jurists to whom the completion of the code was entrusted would have done far better without his intervention. M. Lanfrey shows that to give him the credit of having planned or initiated the work is altogether an error. There is no subject on which there is more misconception than as to the merits of the code Napoleon. Savigny and Austin agree as to its great defects, and they are entirely owing to its hasty execution under the peremptory order

of the Emperor, who was eager to acquire the fame of its publication. Its materials were already prepared on the works of the great French jurists and the ordinances of a long succession of great Chancellors. Nothing in the code is due to Napoleon, except its defects, and they are entirely owing to himself. This is the opinion of Mr. Hayward, a highly competent judge. Mr. Hayward very truly says, in his spirited article on "Lanfrey's Napoleon:"—"The eminent jurists to whom the completion of the code was entrusted would have done far better without his intervention. M. Lanfrey shews that to give him the credit of having planned or initiated the work is altogether a mistake." The most authentic accounts of the preparation of the code fully confirm this, and show that it is quite a mistake to imagine that the French code was really due to Napoleon, or that it does him anything but discredit. The article on "The Vicissitudes of Families," treating of English, Scotch, and Irish nobility, is exceedingly interesting, and well written. Mr. Hayward does not forget his own profession, and mentions that "according to Mr. Foss, the author of the 'Grandeur of the Law,'—(no doubt there is here a clerical error, and it should be "according to Mr. Foss, the author of "Lives of the Judges," and Mr. Phillips, the author of the "Grandeur of the Law,")—a diligent and scrupulous antiquary, between seventy and eighty peerages, including the premier dukedom, have been founded by the legal profession." "In the olden times," adds Mr. Hayward, "a forensic career afforded no presumption whatever of a plebeian organ. So exclusive was the Bar that there exists an ordinance countersigned by Bacon closing its portals—the Inns of Court—against all but gentlemen entitled to coat armours. It must not, therefore, hastily be inferred that every family sprung from law or commerce had a mean beginning." Enough, however, has been said to show that there is a choice of subjects for educated men of any class, and especially for lawyers.

"THE CABINET LAWYER."—This is the twenty-fourth edition of the work, and that simple fact is enough to show its practical value and utility. It is a 'Popular Digest of the Laws of England,' civil, criminal, and constitutional, intended for practical use and general information. The author, in his preface to the first edition, observed that litigation arises less from uncertainty than from the absence of legal information, which ought to be within the reach of every member of the community. "For of the cases brought into courts of law, a large proportion are referable to clear and settled rules of law, of which the parties ought to

have been apprised." There is no doubt that this is the fact, the great majority of cases in the Courts of Common Law, are for this reason not "tried out," but at some stage or other settled, after some delay and expense. A principal object of the present work was, it was stated; "to render accessible to laymen, a knowledge of our law and institutions." The primary design being a Popular Digest, the great objects being compression and simplicity, the former being attained by keeping to a distinct explanation of the immediate matter in hand, the other by avoiding technical obscurity, and following a convenient arrangement." The work is divided into six parts, the first comprises the chief points in the original jurisdiction of the Laws of England; the second treats of the administration of justice, civil and criminal; the third embraces the law affecting classes, or particular descriptions of persons, or ordinary relations of life, the clergy, the magistrates, parish officers, partners, coroners, master and servant, landlord and tenant, &c. The fourth part treats of the inheritance, possession, and transfer or transmission of property, wills, contracts, &c. The fifth part relates to civil injuries, libel, trespass, &c. The sixth treats of criminal law and procedure. There is added a Dictionary of law terms, truisms, Acts of Parliament, and judicial authorities. It might almost be deemed impossible to compress into a single volume so vast a body of law, but the author has pointed out how the object is attained. "It has often been remarked," he says very truly, into how small a compass knowledge may be compressed, by confining it to a simple statement of facts and principles." And this system he has applied to the present work, and, by adhering to it alone, has been enabled to accomplish his task. His aim, he says, has been to condense his statements on each subject into the plainest and most popular language, while following such an arrangement as to enable a reader to find the law on any subject with facility. In the present edition recent changes in the law have been carefully noted, as for instance, the Ballot Act of 1872, and the Judicature Act of 1873. The work is printed in the clearest type, and on the finest paper, and is certainly an extremely useful and interesting work.

THE HAND-BOOK OF THE LAW OF SCOTLAND. By James Lorimer, M.A., F.R.S.E., Professor of Public Law in the University of Edinburgh. Third Edition, By Dugald McKechnie, M.A., Advocate.—Lord Bacon introduced the term "Essays" with humility to cover "attempts," which in the end proved to be substantial facts. So, too, did Lord St. Leonards introduce the modest name of "hand-book" to herald his masculine treatise on Land Rights. Since these two great men left their

several impress on the literature and law of England there has been no end of essays and hand-books. Some have been good, many indifferent and few surpasses the original specimens set by these master hands. Mr. Lorimer, in 1859, produced this valuable *Epitome of Scotch Law*. In his preface the author very accurately, but moderately, set forth his object as being to furnish the means of encountering "with confidence and serenity those occurrences in which the non-professional person must act without professional aid" "In a book intended for practical application in emergencies the first requisite is, that the rules enumerated shall be sage." The author most truly realized these views, and in his comprehensive and exhaustive treatise he dealt with every branch of law at once with perfect accuracy and yet with admirable simplicity. He afforded an ample store house and guide to the non-professional, but farther, it was found by its ample deference to authorities, both institutional and judicial, a most valuable directory and index to the lawyer who was desirous or obliged to trace the doctrines to their principles. It was not, therefore, to be wondered that a second edition of the work was soon called for and which, with valuable aids, the author undertook, bringing down the law to the time of its publication. Since then, legislative changes in the Scotch law have neither been few or unimportant, and therefore a third edition has been rendered necessary and anxiously desired. The author being now worthily seated in the Professional chair of Public Law, which branch of jurisprudence he has illustrated by several admirable publications, he has devolved the preparation of the third edition to one of the most rising of the juniors of the Scotch bar. Mr. McKechnie has performed his task in a manner highly creditable to himself, and worthy of the original work. This is the latest, most accurate, and exhaustive of Scotch legal publications, and we feel confident will secure the same, if not even greater, patronage than what was bestowed on its predecessors.

CONTEMPORARY LEGAL JOURNALISM.

The Scottish Journal of Jurisprudence and Scottish Law Magazine.—This publication well sustains its character, and well represents Scottish jurisprudence, legal journalism, and the effects of Scottish legal education. It has always been our opinion that Scotch lawyers are superior to our own, chiefly on account of the higher character of Scotch law and the higher education of Scotch legal education. The Scotch law is founded more upon the Roman than our own, and the Scotch. Scotch judicial system, being founded on the French, made pro-

vision for a regular system of forensic education and examination in the Scotch, as there was on education in an enlarged. This very number contains an Act of Sederunt, that is, a general order of the Court of Session as to examinations of law agents in general knowledge (history, logic, classics, and mathematics) and in the law of Scotland, civil and criminal: Erskine's Institutes, Bell's Principles, Hume's Commentaries, &c. From this it appears that the writers, Scotch law agents, judges, are properly resolved to keep up the high character of their law agents up to a high standard of education. The effect of the Judicature Act will be to make the character of our judicial system approximate more to that of Scotland. Hence it is naturally of some interest to our Scotch brethren, and we observe our contemporary has been publishing a series of ideas and succinct analyses of the Act. For a similar reason the nature of the Scotch judicial system becomes of greater interest to English lawyers, and we observe in our contemporary many interesting illustrations of it. Lord Brougham long ago pointed out that the Scotch have what we have not to this hour, and shall not have under the Judicature Act, an excellent system of local courts of first instance for the institution of all suits. Our County Courts are miserably inferior courts with limited jurisdiction, originally, indeed, intended for a very small, and with a rough summary procedure, only adapted for such cases. The Scotch Sheriff Courts are excellent courts, with judicature and procedure fitted for all ordinary cases, and, above all, affiliated to the Supreme Court. We observe in our contemporary that a question has arisen as to the power of the Court of Session, where public convenience or necessity requires, to make *interim* appointments to judicial and other offices, and in particular to the office of Sheriff.

The Sheriff in Scotland is not, as in England, a merely annual officer, ministerial officer, but has a permanent judicial office, with a regular deputy, a sheriff substitute, from whom an appeal lies either to the sheriff or the Court of Session, an appeal also lying from the sheriff to that Court. Such men as Sir Walter Scott and Sir Archibald Alison filled the office, and the Scotch sheriffs are generally men of high learning and ability. The periodical before us has a portion devoted to Sheriff Court cases, in which the judgment gives the grounds and reasons, stated in a neat and succinct way. And it appears that the sheriff has a Small Debt Court, which answers to our wretched County Court. From this Court an appeal lies to the sheriff. There are also reports of cases in the Court of Session, the Supreme Court. Thus it seems that the Scotch judicial system is far more complete

and effective than ours is, or will be ever under its new form. the pages of this periodical display the high tone of learning which characterises the Scotch Bar. There is a learned paper on the *Exceptio Re Judicata*, discussing briefly, but ably, the important question how far the judgments of the courts of one state are to be regarded in the courts of another, our own law on the subject had greatly deteriorated under the narrow jealous spirit of the common law; but the writer of this paper truly observes that the whole tendency of modern decisions, under the reviving influence of Roman law is to extend the 'comity of nations' in this respect. The English decisions, however, still show traces of former jealousy on the subject, and the writer observes, that "in the English courts, colonial judgments relating to the same matter are not pleadable in war." The general rule is that a foreign judgment between the same parties on the same question is conclusive. There is an able review of Mr. Rattigan's Treatise, "*De Jure Personarum*," a good specimen of what a review should be, learned, candid, and discriminating; written by one who is himself a master of the subject, who has candour to acknowledge merits as well as acuteness to detect defects. The reviewer observes that the multiplication in England of books on Roman law, is a gratifying sign of the times, and he mentions Lord Mackenzie's "Studies," and Mr. Poste's "Gaius," along with Mr. Rattigan's, as invaluable productions, and of good service to legal literature. There is a paper on the Responsibility of Statutory Trustees for the Fault or Negligence of their Servants, in which our contemporary exults in the reversal by the Lords of the decision in *Finlater v. Dencan*, in the House, in 1839, confirming a judgment of the Court of Session which upheld the liability. The decision, says our contemporary, was followed by the Scotch courts, and for many years road and other trustees continued to be negligent with impunity. At the last the Lords in an English case reversed the former decision, and now our contemporary records a recent decision in the Scotch Court of Session, which he says makes the return of our law to what it was before it was reversed by the House of Lords, in order to render it uniform with the law of England, and it does so on the authority of a recent English decision which reversek the former English law, and brought it into reunion with our original law. This is a natural subject of triumph to our contemporary, who says, "It is strange to observe how opposite to the present decision are the words spoken thirty-four years ago by Lord Chancellor Cottenham, when reversing an original rvl. of law." That is to say in effect the House of Lords has acknowledged that not only the Scotch

They were right as to the law of Scotland, but that the Scotch law, framed by the Scotch courts, was better than the law of England on the subject. . . A fair topic of triumph for Scotch lawyers, and a fair proof of the superiority of Scottish law and of the Scotch judicial system.

SPRING CIRCUITS.

The following is a complete and revised list of the Spring Circuits of the Judges :—

HOME.—(The Lord Chief Baron of the Exchequer (Sir Fitzroy Kelly) and Mr. Justice Lush.) Hertford, March 2; Chelmsford, March 5; Maidstone, March 9; Lewes, March 16; Kingston, March 23.

OXFORD.—(The Lord Chief the Common Pleas (Lord Coleridge) and Baron Cleasby.) Reading, February 27; Oxford, March 2; Worcester, March 7; Stafford, March 12; Shrewsbury, March 19; Hereford, March 24; Monmouth, March 27; Gloucester, April, 1.

NORTHERN.—(Mr. Justice Denman and Baron Amphlett. Appleby, February 14; Carlisle, February 17; Newcastle, February 21; Durham, February 28; Lancaster, March 7; Manchester, March 11; Liverpool, March 24.

WESTERN.—(Mr. Justice Keating and Mr. Justice Quain.) Winchester, February 26; Dorchester, March 5; Exeter, March, 10; Bodmin, March 17; Taunton, March 21; Devizes, March 27; Bristol, April 2.

NORFOLK.—(Mr. Justice Blackburn and Mr. Justice Brett.) Oakham, March 2; Leicester, March, 2; Northampton, March 7; Aylesbury, March 12; Bedford, March 16; Huntingdon, March 19; Cambridge, March 21; Norwich, March 26; Ipswich, April 1.

MIDLAND.—(Mr. Justice Archibald and Baron Pollock.) Warwick, Feb. 25; Derby, March 3; Nottingham, March 7; Lincoln, March 14; York, March 20; Leeds, March 26.

NORTH WALES.—(Baron Pigott.) Welchpool, March 9; Dolgelly, March 12; Carnarvon, March 16; Beaumaris, March 19; Ruthin, March 23; Mold, March 26; Chester and City, March 28.

SOUTH WALES.—(Mr. Justice Honyman.) Haverfordwest, February 21; Cardigan, 27; Carmarthen, March 3; Swansea, March 21; Presteign, March 26; Chester and City, March 28.

The Lord Chief Justice of England (Sir A. J. E. Cockburn) remains in town.

THE LAW MAGAZINE AND REVIEW.

No. IV.—VOL. III.—APRIL, 1874.

I.—THE RULES OF EVIDENCE AS APPLICABLE TO THE CREDIBILITY OF HISTORY.*

BY WILLIAM FORSYTH. ESQ., Q.C., LL.D., M.P.

TO believe without any evidence at all is irrational; but to disbelieve against sufficient evidence is equally irrational.

By sufficient evidence I mean such an amount of proof as satisfies an unprejudiced mind beyond all reasonable doubt. Mathematical truth alone admits of *demonstration*. All other kinds of truth can only be proved by probabilities, which vary in an almost infinite degree, from the faintest kind of presumption to what is called moral certainty, which is accepted as practically equivalent to demonstration.

Upon evidence depends all our knowledge of past events; and it is astonishing how little is often sufficient to satisfy us. The mere fact of its being written in a book is enough to make no inconsiderable number of readers believe in the truth of a statement, without reflecting whether the author had or had not the means of ascertaining the truth; for if he had, we may be justified in putting faith in his honesty; but if he had not, his own assertion is worth nothing.

By proof I mean anything that serves, either mediately or immediately, to convince the mind of the truth or falsehood

* Read at a meeting of the Victoria Institute; or the Philosophical Society of Great Britain, March 2, 1874.

of a fact or proposition; and proofs differ according to the subject-matter of the thing to be proved.

One of the most common, and, at the same time, most satisfactory modes of proof as to things which do not fall within the experience of the senses, is Induction, by which is meant the inference drawn from proved or admitted facts. It is for instance by induction that the general facts of Natural History are proved. When we say that all ruminant animals are cloven-footed, we cannot show any necessary connection between these physical phenomena, but having ascertained by a very large number of instances that they co-exist, and that in no single case that has come under the observation of naturalists they fail, we are led irresistibly to the conclusion that the proposition is universally true, and we should predicate with confidence if a new race of animals were discovered in some hitherto unknown region, that if they are ruminants they are also cloven-footed. The underlying ground of belief in this case is our innate conviction of the prevalence of uniformity in Nature in things of the same kind. This uniformity we call a law.

One test of the probability of a fact is its consistency with other facts previously known or admitted to be true, such as the constitution of human nature, the ordinary course of events, or some well-established truth. But it must be borne in mind, as Laplace has said, although in a different sense, that "Probability has reference partly to our ignorance, partly to our knowledge." We must be tolerably sure we do know the other facts, and that they are not really inconsistent with the fact in dispute. Otherwise we shall be following the example of the King of Siam, who rejected as incredible the statement of the Dutch Ambassador, that water could become a solid mass. This was simply because he had never seen or heard of it before; and it was contrary to his limited experience, or what he thought a law of nature. Hume felt the difficulty of this instance in the way of his argument against miracles, and attempts to get over it by saying that though the fact was not contrary to the king's

experience, it was not conformable to it. But this is not a fair way of putting it. Frost *was* contrary to the king's experience as much as walking on the water without support is contrary to ours. And it cannot be denied that when by universal experience certain laws of nature are known to exist, it requires the strongest possible evidence to make us believe in any deviation from them. Hume's famous argument against miracles is, that no testimony is sufficient to establish a miracle, unless the testimony be of such a kind that its falsehood would be more miraculous than the fact, and that no human testimony can have such force as to prove a miracle, because it is always more likely that the testimony should be false than that the miracle should be true.

The late John Stuart Mill has dealt with this argument in his *Logic*, and, I think, conclusively. He says that Hume's celebrated doctrine, that nothing is credible which is contrary to experience, or at variance with the laws of nature, is merely the very plain and harmless proposition that whatever is contrary to a complete induction is incredible. And he goes on to show that any alleged fact is only contradictory to a law of causation when it is said to happen without an adequate counteracting cause. "Now," says Mill, "in the case of an alleged miracle the assertion is the exact opposite of this A miracle is no contradiction to the law of cause and effect; it is a new effect supposed to be produced by the introduction of a new cause." He adds, truly enough, "That if we do not already believe in supernatural agencies no miracle can prove to us their existence." And we may freely admit with him, that "there is an antecedent improbability in every miracle, which in order to outweigh it, requires an extraordinary strength of *antecedent* probability derived from the special circumstances of the case." I shall have occasion to allude to the subject of miracles again hereafter.

History, from the Greek *ἱστορία*, properly signifies "investigation" or "research," and implies, therefore, etymologically, a narrative based upon inquiry about facts.

Few persons consider what the evidence is of the genuine-

ness of books attributed to authors who lived before the invention of printing, most of which are derived from manuscripts which themselves were only copies, the originals having been utterly destroyed or lost. This includes all the histories of Greece and Rome written by classic authors. I have dealt with this subject in a lecture I delivered in 1872, in the Hall of the Inner Temple, which has since been published under the title of *History of Ancient Manuscripts*.^{*} I have not time to enter upon it here, but it is a very interesting subject of inquiry. I will only mention what Tischendorf, the great German Biblical scholar says, about the manuscripts of the New Testament: "Providence has ordained for the New Testament more sources of the greatest antiquity than are possessed by all the old Greek literature put together."

In one of his essays Lord Macaulay says of history:—"Perfectly and absolutely true it cannot be: for to be perfectly and absolutely true, it ought to record *all* the slightest particulars of the slightest transactions—all the things done, and all the words uttered during the time of which it treats. The omission of any circumstance, however insignificant, would be a defect. If history were written thus, the Bodleian library would not contain the occurrences of a week." And Lord Macaulay might have added that no one would care to have such a mass of useless verbiage in existence. He is surely wrong in saying that history is not absolutely true simply because it does not give us *all* the particulars of the slightest transactions. Even in a court of justice we do not think that a witness is not telling the absolute truth because he does not relate every particular, however insignificant, of the fact or conversation to which he deposes. And this leads me to consider the difference between historical and judicial evidence. The late Sir George Cornewall Lewis says, in that most valuable and learned work, *The Credibility of the Early Roman History* (preface, p. 16), "Historical Evidence, like judicial evidence, is founded on the testimony of credible witnesses. Unless those witnesses had personal and imme-

^{*} *Law Magazine and Review*, for June, 1872.

diate perception of the facts which they report, unless they said and heard what they undertake to relate as having happened, their evidence is not entitled to credit. As all original witnesses must be contemporary with the events which they attest, it is a necessary condition for the credibility of a witness that he be a contemporary, though a contemporary is not necessarily a credible witness. Unless, therefore, a historical account can be traced by probable proof to the testimony of the contemporaries, the first condition of credibility fails." If, however, it is meant to be asserted that the same degree of certainty ought to be required in historical that is required in judicial evidence, it would be exacting too much, and carrying scepticism too far. In the first place, the thing is an impossibility, and the consequence would be, that we should be logically compelled to withhold our belief from nine-tenths of so-called historical facts about which we have really no doubt at all. But, secondly, the circumstances are wholly different. Judicial inquiries relate to minute and special facts in dispute, where two parties are opposed to each other, and it is the duty and interest of both to adduce the best evidence of which the thing to be proved is susceptible. And in all civilized communities, their systems of jurisprudence lay down technical rules of evidence—in some countries much more strict than in others—which circumscribe the range of proofs. For instance, in France, hearsay evidence is always admitted; in England it is always excluded. In some parts of Germany a sort of arithmetical scale is applied to the testimony of witnesses. Different countries apply different rules of legal presumption, which are really not instruments of truth, but technical and positive modes of quieting controversy. But, to quote the words of an eminent writer on the law of evidence, "However widely different codes may vary from each other in matters of arbitrary positive institution, and of mere artificial creation, the general means of investigating the truth of contested facts must be common to all. Every rational system which provides the means of proof must be founded on experience

and reason, on a well-grounded knowledge of human nature and conduct, on a consideration of the value of testimony, and on the weight due to coincident circumstances." *

But history deals with general rather than particular facts—with results rather than details—and from the nature and necessity of the case must be content with looser modes of proof than is necessary or expedient in judicial trials. All that we are entitled to ask from her is such an amount of evidence for the truth of the facts which she records as would satisfy the understanding of a reasonable man in the ordinary affairs of life. Every day we act upon evidence which, if offered in a court of justice, would be rejected. Too often we act upon very slight and insufficient evidence, especially in cases affecting the character of others, but in so far as we do this we act wrongly; and in the same manner we act wrongly when we accept as true the mere statement of a historian on any question where truth is of importance, when we have it in our power to examine his authorities and judge of their value for ourselves.

It is part of the constitution of human nature to confide in the veracity of others. If this were not so a man's belief would be limited to matters within his own personal experience, and no progress could be made in knowledge, nor would improvement be possible. There is a tacit assumption when we yield to the force of oral evidence of what I may call the major premiss of our syllogism, viz., that men will generally speak the truth. Experience teaches us, if indeed it is not an intuitive impulse, to put faith in human testimony.

How beautiful is the trusting simplicity of childhood, and the absolute reliance which a child places in the word of its parents. But as we grow older this confidence is shaken, and experience compels us to acquiesce in the truth of the melancholy maxim of Lord Chatham, that "confidence is a plant of sloth growth in an aged bosom." That stern monitor experience tells us that it by no means follows that

* (Preface to Starkie, On the Law of Evidence.)

because we have contemporary testimony to a fact, the fact is true. Witnesses are often mistaken, and their evidence is not unfrequently false. We must, therefore, so far as is possible, apply certain rules by which to test the probability, and that is the agreement of the fact with other facts known or admitted to be true. Another test is the concurrence of the testimony of independent witnesses, always supposing that each of them has had the means of knowing the fact or facts to be ascertained. Of course I exclude all copying from the same original, and this, perhaps, is implied in the word independent. As Archbishop Whately has observed, "For though in such a case each of the witnesses should be considered as unworthy of credit, and even much more likely to speak falsehood than truth, still the chances might be infinite against their all agreeing in the same falsehood" (*Rhetoric*, pt. i. ch. ii. sec. 4). And in his *Philosophy of Rhetoric*, Dr. Campbell says: "It deserves likewise to be attended to on this subject, that in a number of concurrent testimonies (in cases wherein there could have been no previous concert) there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses, a probability which would remain, even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance is as one to infinite; that is, in other words, morally impossible." Lord Mansfield once said, with reference to the credit to be given to certain reporters, "It is objected that these are books of no authority, but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstration of the truth of what they report or they could not agree"*

Generally speaking, the silence of contemporary writers as to a fact throws strong suspicion on its genuineness. But this test is not conclusive, for we may have overpowering evidence *aliunde* of its truth. Lord Macaulay says: "We

* B. v. George, 1 Cowp. 16.

have read books called histories of England under the reign of George II. in which the rise of Methodism is not even mentioned." And Varnhagen von Ense mentions in his Diary that Humboldt had adduced "three important and perfectly undeniable matters of fact as to which no evidence is to be found where it would be most anticipated. In the archives of Barcelona no trace of the triumphal entry of Columbus into that city; in Marco Polo no allusion to the Chinese Wall; in the archives of Portugal nothing about the voyages of Amerigo Vespucci in the service of that crown." But notwithstanding this, the silence of contemporary authority is one of the notes of falsehood with respect to an alleged historical fact. How do we know that the story of William Tell and his shooting an arrow at an apple on his son's head is untrue? Because we do not find it in contemporary history; and the first mention of it as a Swiss legend occurs in the chronicle of Melchiour Russ, registrar at Lucerne, some two hundred years later. But, in addition, we find that the same story is told in Saxo Grammaticus, who wrote in the twelfth century, of a Danish hero; a similar tale was current in Ireland; and in the *Bilkinsaga* it is told of the mythical Eigil, the brother of Wieland, the smith. It also occurs in the legendary fables of Holstein, Norway, and other countries; and although it is impossible to trace the origin of the story, it is certain that no such occurrence happened in Switzerland. It is one of the *enfants trouvés* of historical literature, which can lay no claim to legitimate paternity.

Why do we reject the story of the blind Belisarius begging his bread in the streets of Constantinople? Because Procopius, who was a contemporary historian, and accompanied Belisarius in his Eastern wars, in Africa, and in Italy, says nothing, in his account of the life and misfortune of Justinian's famous general, of his blindness or beggary; because no other contemporary writer mentions them, and because the first hint of them occurs in some Greek verses written by John Tzetes, a grammarian, about 600 years

after the death of Belisarius. Why do we not believe the fable of Pope Joan, whose accouchement is said to have taken place in the midst of a procession at Rome? Because no contemporary author makes mention of such an astounding occurrence, and we find the first allusion to it in the *Chronicon* of Marianus Scotus, who lived two hundred years afterwards. Even that passage is supposed to be an interpolation, and the first author who really tells the story is Stephen de Bourbon in the thirteenth century. A not improbable explanation of it is that one of the Popes, who led an immoral life, had a mistress named Joan, who had such influence over him that she was called *Papesse*, and from this the story had its origin.

Why do intelligent and well educated men accept as true the miracles of the New Testament, and reject as untrue the legends of the Saints? This is not the place, nor would it be possible within the limits to which I must confine myself, to go into the proofs of the miracles related in the Gospels and the Acts. But briefly and summarily it may be said that we believe them,—1. Because they are recorded by eye-witnesses, who must either have been the dupes of an imposture or the fabricators of a falsehood. 2. They were done openly in the face of enemies who, so far as we know, never denied them. 3. They were done with an adequate motive and cause. 4. They serve to explain the origin of a religion which has lasted for eighteen centuries and won its way in spite of the fiercest opposition. Now, applying these tests to the legends of the Saints, we find that they fail in almost every particular! Hardly any of them rest on the testimony of eye-witnesses. They are almost always isolated acts done in a corner, and not *coram populo*. And the most famous of them, which is an exception to the rule, I mean the speaking articulately and distinctly by a number of Christians at Tipasa after the roots of their tongues had been cut off, has been shown by Mr. Twistleton, in his able work, *The Tongue not Essential to Speech*, to be no miracle at all, but perfectly explainable by natural causes. Moreover,

the mediæval miracles are for the most part silly, unmeaning, and childish; and they are often recorded by writers who lived long after they are said to have occurred, who breathed an atmosphere of credulity and were utterly destitute of the critical faculty. If it is objected that intelligent Roman Catholics believe them, we answer that they are the disciples of a system which forbids the right of private judgment on questions determined by the authority of the Church; and we may well think it easy for men who believe in the doctrines of the Immaculate Conception and the Infallibility of the Pope, to believe also in the winking of an image of the Virgin, the liquefaction of the blood of St. Januarius, and the transportation through the air of a house of the Virgin from Palestine to Loretto. Thus we find a man of the intelligence of Dr. Newman: "Crucifixes have bowed the head to the suppliant, and Madonnas have bent their eyes on assembled crowds. St. Januarius's blood liquefies periodically at Naples, and St. Winifred's well is the source of wonders even in an unbelieving country St. Francis Xavier turned salt water into fresh for five hundred travellers; St. Raymond was transported over the sea on his cloak; St. Andrew shone brightly in the dark I need not continue the catalogue. It is agreed on both sides; the two parties join issue on a fact—that fact is the claim of miracles on the part of the Catholic Church. It is the Protestant's charge, and it is our glory."

I may here in passing allude to the monstrous theory of Strauss that the simple narratives in the four Gospels are mere myths, which grew out of a body of belief which, somehow or other, had taken possession of men's minds in the second century of our era, and are no more real than the legends of Theseus and Hercules. Our common sense revolts against such an absurdity, and if Strauss himself really believed it, it only shows that no credulity can be greater or more childish than the credulity of an infidel.

Why do we believe Thucydides and disbelieve Livy? I shall speak of both of these writers more fully hereafter, but

here I may say that we believe Thucydides because he was a contemporary of the events which he relates; he was himself an actor in some of them: he had access to authentic information, both oral and monumental, and we have no reason to distrust his veracity. Of course I do not include the long speeches he puts into the mouth of the characters he introduces, for they are obviously manufactured, or, at all events, dressed up for the occasion, according to a practice very common in antiquity. We disbelieve a great part of the narrative of Livy for the following reasons. We know that he could have no trustworthy authority for many of his statements respecting the early history of Rome, some of those statements are intrinsically improbable, if not incredible: he lived centuries later than many of the events which he records, and he had not the critical faculty which enables an historian of the past, by a kind of instinct, to separate the true from the false. To this I must add the essentially Roman prejudice in favour of everything that would tell in favour of the greatness and glory of Rome. Hence his unfair account of the early wars of the Republic, and the injustice with which he has treated Hannibal.

We believe the story of the Anabasis and Retreat of the Ten Thousand, because the historian was the general who commanded the Greeks in that famous expedition; but we reject his fables about dreams, omens, and prophesies, because we know that he was credulous about such things, and they were not matters which came within the scope of his own personal observation.

Our own early historians were as careless as their readers were credulous. King Lear, the son of Bladud, was accepted as an historical personage; and even Milton, in his History of England, admits the fable "of Brutus and his line with the whole progeny of kings to Julius Cæsar," although it is impossible not to see that he has little faith in it. But he says, "certain or uncertain, be that upon the credit of those whom I must follow; so far as keeps aloof from impossible and absurd, attested by ancient writers from books more

ancient, I refuse not as the due and proper subject of story." Now, why do we refuse to believe the narrative? Simply because, although it may contain nothing "impossible or absurd," which is Milton's sole rule of exception, we know that the authors could not possibly have had any authentic information about the facts which they record. A child is as competent to write history as a grown-up man, if the statements of preceding authors are the sources of their authority and the means they had of ascertaining the truth.

Dates are often of the utmost importance in verifying historical facts, but the dates themselves are sometimes uncertain. In Grecian history the general custom was to reckon by the year of the Olympiad, and therefore it is essential to know the date of the first year of the first Olympiad. Now, how do we ascertain this? If you look into Clinton's, *Fasti Hellenici*, p. 150, you will see that it is taken to correspond with 776 B.C., and this is proved by a curious *consensus* of authorities. The games were celebrated at intervals of four years, and if we know independently the exact date of an event, and find it placed in the particular year of a particular Olympiad, we can, by reckoning backwards, ascertain accurately the date of the first. For instance, we know, from contemporary or other evidence, that the consulships of C. Pompeius Gallus and Q. Verannius, at Rome, coincided with the first year of the 207th Olympiad, and we know the year of the Christian era of those consulships: this was the year A.D. 49. Now 206 Olympiads or 824 years had elapsed since the beginning of the first, and this gives the year B.C. 776 as its date.

It is no doubt difficult to invent wholly so-called historical facts, which, if closely compared with known contemporaneous occurrences and ascertained dates, may not be shown to be false. But it is often still more difficult to find the material for such criticism. Oblivion may have swallowed up the records of the past, and then the only tests we can apply are the inherent probability or improbability of the alleged facts, their consistency or inconsistency with them-

selves, and our knowledge of the means which the writer possessed of being acquainted with their truth. I have already pointed out the untrustworthiness of historical statements first made by authors who lived long after the events which they record. And I have also shown that it is by no means altogether safe to gauge the credibility of a fact by its agreement or disagreement with probability; but as regards the test supplied by the means of comparing historical allegations with other historical facts which have been sufficiently proved, some of the most brilliant triumphs of criticism have been won by applying it. My time is too limited to allow me to adduce more than one or two specimens of this, and I think I cannot do better than cite that splendid example of scholarship and criticism, Bentley's *Dissertation on the Genuineness of the Epistles of Phalaris*. The history of its authorship is this. About the year 1690, Sir William Temple published an essay upon Ancient and Modern Learning, in which he maintained the superiority of the ancients. And in support of his position, "that the oldest books we have are still in their kind the best," he adduced the "Fables of Æsop" and the "Epistles of Phalaris." This attracted attention to the epistles, and a new edition of them was given to the world by the Hon. Charles Boyle; and then Bentley published his *Dissertation on the Epistles of Phalaris*, the object being to prove that they were spurious. I may mention, in passing, that an amusing parody of the original controversy between the respective champions of ancient and modern learning was written by Swift, called "The Battle of the Books." It may be interesting to point out some of the proofs by which Bentley for ever destroyed the credit which had been given to these epistles—

(1.) He shows that in them Phalaris speaks of borrowing money from the inhabitants of a town in Sicily nearly three centuries before that town was built.

(2.) Phalaris is represented as giving to the physician a present of cups, called by the name of a Corinthian potter who lived more than a hundred years after Phalaris' death.

(3.) Phalaris speaks of Zancle and Messene as distinct towns, whereas, in truth, Zancle was merely the ancient name of Messene.

(4.) In one of his letters, Phalaris addresses Pythagoras as a philosopher, and speaks of his system of philosophy, whereas we know that Pythagoras first called himself a philosopher, or lover of wisdom, when Leon of Sicyon asked him what he was. And it is impossible to believe that the term was in vogue, or even known to Phalaris, who, when he wrote the letter, had never seen Pythagoras.

(5.) Phalaris is very angry with Aristolochus for writing tragedies against him at a time when the word tragedy was utterly unknown.

(6.) Phalaris writes in Attic Greek, whereas, as a Sicilian, his dialect would have been Doric.

Let me illustrate this kind of criticism by a different example. On the Monte Cavallo—the old Quirinal Hill, at Rome—stand two colossal statues of horses, called “I Colossi di Monte Cavallo.” Under one pedestal are, or were, inscribed the words *Opus Phidiæ*, *Opus Praxitelis*. But formerly there were two more elaborate inscriptions, one to the effect that Phidias had here sculptured Bucephalus, the horse of Alexander the Great; and the other that Praxiteles, in competition with Phidias, had sculptured another figure of the same horse, Bucephalus. Now Phidias died somewhere about 439 B.C. Praxiteles flourished in 364 B.C., nearly a century later, and Alexander the Great was not born until 356 B.C. This was too much for even the credulity of a by-gone generation, and Pope Urban VIII. effaced the inscriptions, and substituted for them the simple words *Opus Phidiæ* and *Opus Praxitelis*, which had at all events the merit of not being guilty of a palpable anachronism, although each is most probably absolutely untrue. But such an anachronism is not quite so bad as that of the writer in a *feuilleton* of the *Constitutionnel* (supposed to have been Lamaratine), who says, “The tombs of great poets inspire great passions. It was at Tasso’s tomb that Petrarch nourished his respectful remembrance of *Laura* !” Now, Petrarch died in 1374, and Tasso published his *Gerusalemme Liberata* in 1581 !

This is very different from any argument against the genuineness of a fact founded merely on discrepancies of statement. A curious instance of this occurs in the accounts given of the execution of the Earl of Argyle in 1661. Clarendon says that he was condemned to be hanged, and executed. Burnet and Echard say that he was beheaded. This has been made use of by Paley, in his *Evidences of the Christian Religion*, with reference to the variance in the statements of the Evangelists as to the circumstances of the Crucifixion. No one doubts that Argyle was executed, which is the important fact; and there would be still less reason to doubt the fact of the Crucifixion, however the Evangelists may differ in minute details. It is, of course, a difficulty in the way of those who assert the literal and verbal inspiration of the Scriptures, but that is a subject foreign to my purpose, and too large to be dealt with by a passing notice in such an address as this.

It is a strange paradox that the belief of some writers and many readers seems to increase in the inverse ratio of the probabilities of the case. How else can we account for the fact that the more history recedes into the darkness of the past, bold statements are received with unquestioning credulity. Thus Dr. Hales, in his work on chronology, assures us that the thirty reigns of the Athenian kings and archons from Cecrops to Creon, from "one of the most authentic and correct documents to be found in the whole range of profane chronology,"—the truth being that the reigns of the kings are little better than fabulous; and Bunsen, in his *Egypt's Place in Universal History*, undertakes to reconstruct the authentic chronology of Egypt for a period of nearly 4,000 years before Christ, and to "restore to the ancient history of the world the vital energy of which it has been so long deprived," although his chief [authorities, independently of some monumental inscriptions, are Eratosthenes and Manetho, writers who lived more than 3,000 years after the period which they are supposed to authenticate. Now Manetho composed his history from two sources, temple registers and

popular legends. I need say nothing about the latter, but what possible ground have we for believing that their priest-kept registers contained true accounts of the events that happened thirty or forty centuries before the historian inspected them? Eratosthenes, at the request of Ptolemy, drew up a list of thirty-eight Theban kings, occupying a period of more than a thousand years: and it is sufficient to say, with Mr. Grote, that "he delivered positive opinions upon a point on which no sufficient data was accessible, and therefore was not a guide to be followed. History thus written is nothing but clever guess-work, and amounts to no more than plausible conjecture, in which the chances are almost infinite that the narrative is, if not wholly, at least materially wrong. As the speculation of an ingenious mind it may be interesting, but as a record of facts it is worthless."

In his essay on the uncertainty of the history of the first four centuries of Rome, in the *Memoirs of the Academy of Inscriptions*, tome vi. p. 71, M. de Pouilly says:—"History is the narrative of a fact which we derive from those whom we know to have been witnesses of it. It results from this definition, that for a history to be authentic its author, or at all events the person on whose narrative it is based, must have lived at the time when the events happened." And the same writer, adds, "Tradition is a popular rumour of which the source is not known. It is a chain of which we hold one end, but the other is lost in the abysmal depths of the past."

To show the danger of trusting to tradition, I may take as an illustration the amusing game called "Russian Scandal," where a party being seated together in a row, a person at one end whispers some story into the ear of his neighbour, who repeats it in the same manner to the one next to him; and so on until it comes to the last, who tells aloud what he has heard. It will be generally found that the story thus transmitted varies essentially from the story as originally told, and the experience of every one as to the gossip of society teaches the same lesson. Laplace, in his *Essai Philosophique*

sur les Probabilités, has made this the subject of a mathematical calculation. He says, "Suppose a fact to be transmitted through twenty persons; the first communicating it to the second, the second to the third, &c., and let the probability of each testimony be expressed by nine-tenths (that is, suppose that of ten reports made by each witness nine only are true), then at every time the story passes from one witness to another the evidence is reduced to nine-tenths of what it was before. Thus, after it has passed through the whole twenty, the evidence will be found to be less than one-eighth."

But belief depends by no means upon actual testimony. We believe in the result of mathematical inquiry by reasoning. We believe in the existence of a Creator by arguments drawn from design and other considerations. We may or may not believe that the planets are inhabited from arguments drawn from analogy. We believe many other facts from their inherent probability, and so on. But in many such cases it would be more proper to speak of our persuasion than our belief, by which I mean, that our minds stop short of full conviction; but on weighing the evidence or arguments on both sides in opposite scales, we see that the balance inclines one way more than the other, and therefore we are disposed to think that such and such a proposition is true. This applies to many of the disputed facts of history. In his *Grammar of Assent*, in order to show that certitude is the result of arguments which, taken in the letter, and not in their full implicit sense, are but probabilities, Newman takes the case of the following propositions:—

(1.) That we are absolutely certain that Great Britain is an island. But how do we know this? Those who have actually circumnavigated the country have a right to be certain; but which of us has done this, and which of us has even met with one who tells us that he has done it? Newman shows by the common arguments there would be a manifest *reductio ad absurdum* attached to the notion that we could be deceived on such a point as this, but at the same time that

we are satisfied with proof which is not of the highest kind.

(2.) He takes the question of the authorship of the *Æneid*, the plays attributed to Terence, and the so-called histories of Livy and of Tacitus, which the Abbé Hardouin maintained were the forgeries of the monks of the thirteenth century. We must not forget that our knowledge of the ancient classics come entirely from mediæval copies of them made by monks from manuscripts which no longer exist. How do we know that some of these so-called copies were not actual forgeries? * The strongest argument against such a supposition is our disbelief in the ability of mediæval monks to produce such works; and Newman says, justly enough, that to an instinctive sense of this and a faith in testimony we must add the absence of dissentient claims, and this will be found to be one of the most cogent reasons for our belief.

(3.) Newman asks, What are my grounds for thinking that I, in my particular case, shall die? What is the distinct evidence on which I allow myself to be certain? Death to me is a future event. How do I know that, because all past generations have died, the same law must hold with regard to myself or others? He says, that the strongest proof I have for my inevitable mortality is the *reductio ad absurdum*; but I think that here he is mistaken that there is *reductio ad absurdum*, in the proper sense of the term, in the belief that I shall never die, although we may admit, with Newman, that there is a surplusage of belief over proof when I determine that I individually must die.

In that very clever and amusing *jeu d'esprit* by Archbishop Whately, *Historic Doubts relative to Napoleon Buonaparte*, he has shown that logically we are not justified in believing that such a person as the first Emperor of the French ever existed. To state such a proposition seems to carry with it its own refutation, but the mock-serious argument of the Arch-

* "To forge and counterfeit books and father upon great names has been a practice almost as old as letters."—Bentley's *Dissertation on Phalaris*.

bishop is sustained with wonderful skill and ability. His object, of course, was to show that the kind of reasoning by which infidels attempt to shake our faith in the narrative of Scripture *ought* equally to shake our belief in the existence of the first Napoleon.

I will now say a few words about the father of history, Herodotus, and briefly compare him with Thucydides. In the *Literature of Greece*, Colonel Mure calls Herodotus "an essentially honest and varacious historian," and says that, "rigid, in fact, as has been the scrutiny to which his text has been subjected, no distinct case of wilful misstatement or perversion of fact has been substantiated against him." Now what were the materials which Herodotus had for composing his history? They were (1) previous histories; (2) monumental records preserved in national repositories and religious sanctuaries or places of public resort. He himself quotes only one older historian, Hecatæus of Miletus, but several others had written before him, such as Egeon of Samos, Bion, and Deïochus of Proconnesus, Endemus of Poros, Charon of Lampsacus and Phercydes of Leros. We do not, however, know that Herodotus really had access to copies of their manuscripts, which would have been written on *papyri*, and must have been few and costly. He was a great traveller and a diligent inquirer, and obtained a considerable part of his information from what he saw with his own eyes, and heard from persons acquainted with the facts. He tells us that he sifted and compared conflicting statements, and he often rejected stories which he did not think he had warrant for believing. But it is curious that in some cases his scepticism is now known to have been wrong. Thus he disbelieves the story of the circumnavigation of Africa by the Phœnicians in the seventh century before our era, on account of the marvel related by the voyagers, that as they sailed "they had the sun on their right," which is the strongest possible confirmation of the truth of the account. He cautiously doubts the existence of an amber-yielding district on the Northern Sea, and of any islands

called Cassiterides, from which tin was said to be brought. But we know that amber is found on the shores of the Baltic, and that the Cessiterides were our own Scilly Islands. Some of his statements, which ~~were~~ formerly regarded as impossible or incredible marvels, have, by the progress of later discovery, been proved to be true. Such are his accounts of a race of men dwelling upon scaffoldings in Lake Prasias and living upon fish (v. 16), in fact, Lacustrians; of a breed of sheep in Arabia with such long tails that they were supported on trucks to preserve them from injury (iii. 13), as in the case in North Africa, and, I believe, in some parts of Spain at the present day. And to show that he is by no means the *gobemouche* that he is sometimes represented, I may instance what he says of the Arimaspians, a one-eyed race, who stole gold from the griffins, whom Milton thus mentions:—

“As when a gryphon in the wilderness,
With winged course o’er hill or moory dale,
Pursues the Arimaspians, who by stealth,
And from his wakeful custody purloined
The guarded gold.”

Herodotus says that he cannot persuade himself to believe the story, giving the sensible reason that there cannot be a race of men with one eye, who in all things else resemble the rest of mankind.

The value of Thucydides as a historian depends, first, on our faith in honesty, and, secondly, on the fact that he had access to contemporary testimony both oral and monumental. He was born about twenty-five years before the outbreak of the Peloponnesian war, and he took part in some of its events; but he most chiefly relied for information on the statements (i. 132-134), and letters, and despatches (iv. 50; vii. 8; viii. 50), of which he had no doubt seen the originals or copies. He clearly was a man of sound judgment and great intelligence. Upon the whole we have as good reason for believing the history of Thucydides as we have for believing any other profane author; but, as I have before observed, we are not to suppose that the long speeches which he puts into the mouths of Pericles and others were spoken

as he reports them. They are rather forms of stating the arguments on both sides, such as Thucydides understood them.

Until a comparatively recent period the history of Rome, as told by Livy, was implicitly believed; and as much credit was given to his account of the regal government of Rome as to the annals of the Empire by Tactius, a contemporary writer, Machaivel, in his *Discourses on the First Decade of Livy*, accepts the story of the twelve kings as not less real than the story of the lives of the twelve Cæsars.

The first scholar who seems to have questioned the truth of the old narrative about Rome was Cluverius (a Latinized name for Philip Cluver, who was born in Dantzic in 1850). He published, in 1624, a book called *Italia Antiqua*, in which he expressed his opinion that Roman history before the capture of the city by the Gauls was all uncertain; and he rejected the account of Trojan settlement, in Latium, the Alban dynasty, and the story of the foundation of Rome by Romulus. Others followed in the same track; I may mention Bochart, and Perizonius, and Pouilly, until at last the subject received an exhaustive examination in the remarkable work of Beaufort, a French Protestant refugee, who published at Utrecht, in 1738, his *Dissertation sur l'Incertitude des Cinq Premiers Siècles de l'Histoire Romaine*.

Beaufort is entitled to the honour of ranking as the pioneer of a new school of criticism; but it was not until the publication of Niebuhr's *History of Rome*, in 1811-12, that the subject attracted the attention it deserved. This work may be said to have revolutionized the world of thought in relation to Roman history. Its destructive power is irresistible, but its constructive power is very different. I will not say that Niebuhr endeavoured to evolve a history of Rome out of his own consciousness—like the famous story of the camel evolved by one of his countrymen—but he certainly trusted a great deal too much to sagacity of conjecture, which he dignified by the title of "discovery." He even goes so far as to liken his faculty in that respect to the

parva of the Greeks (vol. iii. p. 318). But it is one thing for a Cuvier or an Owen to build up the form of an animal from a single bone, and another for a historian to presume to construct a narrative of the distant past from a few isolated hints, or even isolated facts. In the animal form there is a correlation of parts, and a law of typical conformity which enables the anatomist to ascend with almost unerring certainty from bone to limb, and from limb to body, and to clothe the body with its proper integuments, until we can see by the eye of imagination the very form that has ceased to exist upon the earth for perhaps millions of years. But such an induction is not possible in the case of human affairs and human actions; *varium et mutabile semper* would be their appropriate motto, and the events that actually happen often verify the saying that truth is stranger than fiction.

There is an old Scotch proverb, "Give a romancer a hair and he will make a tether of it," and this applies to a certain school of writers of history. Out of a scrap of prose or a line of verse, or a broken fragment of an inscription, they will, by the aid of an active imagination, construct whole pages of narrative. The character of a people and the state of its society will be inferred from a few lines which may, when they were written, have been quite untrue, or mere satire, or a gross exaggeration. The historian in modern times who has been most conspicuous for the use of such materials is Lord Macaulay. The result is, that not consciously but inevitably truth is sacrificed to effect. I will mention two instances of this—his account of the Highlands, and his account of the state of the English clergy in the seventeenth century.

It is not pleasant to detract from the merit of a work of such brilliancy as Lord Macaulay's History, but it is impossible not to see that he has been mislead into many great mistakes. I speak not now of his almost bitter hatred of the Duke of Marlborough, which induces him to paint his character in the blackest colours, and his almost idolatrous

admiration of William III., which induces him to palliate all his faults, even that of faithlessness to his wife ; but I allude to specific facts, in which the historian has been shown to be utterly wrong, and I would recommend those who doubt it to read the *New Examen*, by Mr. Paget (London, 1861), in which the author has, with admirable acumen, instituted "an inquiry into the evidence relating to certain passages in Lord Macaulay's History." He has shown, I think satisfactorily, that Lord Macaulay has been inaccurate and unjust in his account of the execution by Claverhouse, of Brown, the so-called Christian carrier ; that he has confounded William Penn, the founder of Pennsylvania, with a George Penn, in describing a disreputable transaction relative to the maids of Taunton ; and that he is mistaken in several other matters of fact.

I have often thought how strangely history would have to be re-written, if we could summon from the world of spirits those who were the chief actors in many of the events which it records, and obtain from them a true version of such events. How many motives would then be disclosed of which we now know nothing ! How many inferences would be shown to be erroneous ! How many facts would be altered in their complexion ! And yet, in fairness, I ought to mention, how seldom it has happened that popular verdicts, with respect to the characters and events of history, have been proved to be wrong by subsequent researches. I may instance the attempts that have been made of late years to whitewash the characters of Tiberius, Henry VIII., and Robespierre, all of which seem to have signally failed.

Amongst other questions we should like to be able to put to satisfy our curiosity, I may select almost at random the following. Who were the Pelasgians and whence came the Etrurians ? Was there a real war of Troy, and what were the facts ? Did Demosthenes receive any part of the money given up by Harpalus when he was arrested at Athens ? Who was the real founder of Rome ? What was the origin of the story that the Laws of the Twelve Tables were the

result of a mission sent from Rome into Greece in the fifth century before Christ? What authority had Suetonius for nine-tenths of the gossiping anecdotes contained in his *Lives of the Twelve Cæsars*? Was St. Peter every Bishop of Rome? Beyond mere tradition there is no evidence that the Apostle ever even visited that city, much less that he was Bishop of it. Let those who assert the contrary refute if they can, the facts and arguments of Barrow, in his *Treatise on the Pope's Supremacy*. And yet, how much of the teaching of the Roman Catholic Church depends upon the assumption that St. Peter was the first Bishop of Rome, and that the Popes are his legitimate successors! Was Petrarch's Laura a living creature of flesh and blood or a mere poetical myth? What was the real character of Richard III., and is it true that he was accessory to the murder of the Princes in the Tower, if murdered they were?

Horace Walpole concludes his ingenious essay called *Historic Doubts in the Life and Reign of King Richard III.* in the following words:—"We must leave this whole story dark, though not near so dark as we found it; and it is, perhaps, as wise to be uncertain in one portion of our history as to believe so much as is believed in all histories, though very probably as falsely delivered to us, as the period which we have here been examining."

What were the real facts of the Gowrie conspiracy in Scotland? Did Mary Queen of Scots really write the letters to Bothwell which were produced from a silver casket before the Commissioners at Westminster, and which, if genuine, establish the fact of her being accessory to the murder of Darnley? Was Anne Boleyn guilty of the charges brought against her by Henry VIII.? Mr. Froude has laboured to prove that she was, but his arguments are very far from convincing. What was the real cause why James I. spared the life of the Earl of Southampton, after his conviction of the murder of Sir Thomas Overbury? Who was the man in the Iron Mask? Who wrote the letters of Junius? It is extraordinary how few of the anecdotes which pass current

in literature will bear the test of critical inquiry, and the result of a careful investigation of the evidence is apt to dispose the mind to general scepticism on such subjects. Let me mention a few instances which will serve to enliven what otherwise, I fear, has been rather a dull discourse.

The first I shall mention is not an anecdote, but a so-called historical fact. We find it stated in *Lempriere's Classical Dictionary* that the Army which Xerxes led into Greece consisted of upwards of five million souls, and he says that "the multitude which the fidelity of historians has not exaggerated was stopped at Thermopylæ by 300 Spartans under King Leonidas." The thing is simply impossible, and therefore incredible, unless we adopt the maxim of Tertullian, and say *Credo quia impossibile est*.

The story of Canute commanding the waves to advance no farther first appears in Henry of Huntingdon, who wrote a century after the Danish king. The legend of Fair Rosamond is treated by Hume as fabulous; and the greatest suspicions rests on the account of St. Pierre and his companions delivering up the keys of Calais to Edward III., with halters round their necks, and having their lives spared at the intercession of the Queen. The popular story of the origin of the Order of the Garter, as owing to the accident that happened to the Countess of Salisbury when dancing at the Court of Edward III., is first mentioned by Polydore Virgil, who wrote 200 years later. In the *Lives of the Judges*, Mr. Foss has shown that the story of the re-appointment of Sir William Gascoigne as Chief Justice, by Henry V., who, when Prince of Wales, had been committed by him to prison for an assault, is the reverse of true, for it seems that Henry V. actually deprived him of the office of Chief Justice, a few days after his accession to the throne. The interesting story that Cromwell, Hampden, and Hazelrigg had actually embarked for New England in 1638, prepared to abandon the country for ever, when they were stopped by an Order in Council, has been proved to have no foundation in fact.

The celebrated phrase attributed to Francis I. after the battle of Pavia, *Tout est perdue hors l'honneur*, turns out to have been *l'honneur et la vie qui est sauvé*, which deprives it of all its point. As to the story of the chivalrous interchange of courtesies between the English and French guards at the battle of Fontenoy, "Monsieur, bid your men fire"—"No, sir, we never fire first"—Carlyle says, in his *Life of Frederick the Great* (vol. iv. p. 119), "It is almost a pity to disturb an elegant historical passage of this kind circulating round the world in some glory for a century past; but there has a small irrefragable document come to me which modifies it a good deal and reduces matters to the business form." This document is a letter from Lord Charles Hay, lieutenant-colonel of the Guards, written or dictated about three weeks after the battle, and giving an account of what happened. In this no mention is made of the occurrence, and we may confidently believe with Carlyle, that "the French mess-rooms (with their eloquent talent that way) had rounded off the thing into the current epigrammatic reduction."

We all know how French historians, including M. Thiers, repeat the story of *Le Vengeur* refusing to strike her flag in the action of the 1st of June, 1794, and going down into the depths of the ocean while her crew shouted *Vive la République!* This has been shown by Admiral Griffiths, who was living in 1838, one of the few survivors of the engagement, and who wrote a letter on the subject, to be, as he calls it, "a ridiculous piece of nonsense." When the *Vengeur* sank the action had ceased for some time. She had been taken possession of by the boats of the *Culloden*; and as to the crew, Admiral Griffiths says, "never were men in distress more ready to save themselves." There was "not one shout beyond that of horror and despair." And yet the lie will live in the annals of French heroism, and will perhaps be believed to the end of time.*

Before I conclude I will, with reference to the special objects of this Institute, state in as terse a form as possible the

*See Carlyle's *Essays*, vol. v., p. 856-859.

reason why we are justified in believing on historical grounds the truth of the narratives in the New Testament, excluding all considerations of its doctrines:—

(1.) The contemporary nature of the testimony.

(2.) The artlessness and *apparent* truthfulness of the writers.

(3.) The Substantial agreement, together with the circumstantial variety of the statements, of four different contemporary eye-witnesses.

(4.) The undesigned coincidences which exist between the Gospels and Acts, on the one hand and the Epistles on the other.

(5.) The absence of any conceivable motive for fraud or falsehood.

(6.) The difficulty, if not the absurdity, of supposing that the teachers of the purest morality should be engaged in the immoral work of propagating an imposture and foreign documents.

(7.) The utter absence of any contradiction to their statements during the first four centuries.

(8.) The frequent reference to the words of the four Evangelists by writers who lived in the first two centuries, showing that their narratives were then current and well known.

(9.) The adequacy of the cause for miraculous interposition, if we believe in a benevolent Creator and in the immortality of the soul.

(10.) The sufficiency of the accounts to explain the phenomenon of Christianity as a religion which now exists in the world, whereas no other theory has explained or can explain it.

If these are not sufficient grounds for believing the truth of the accounts that have come down to us, I know not any historical fact which we are justified in believing.

II.—THE WORKS OF EDWARD LIVINGSTON.

THE Works of Livingston are more valuable than any others for the light they throw on the improvement of criminal law and procedure and prison discipline; and the "National Prison Association of the United States" have done a great service not only to America, but England, and all English speaking communities, in issuing a new and handsome edition of the works of the great American jurist on Criminal Jurisprudence.* America has reason to be proud of her lawyers and her jurists; she has still greater reason to be proud of her having produced the only legist of the age. The character of a legist is as distinct from that of a jurist, as that of a jurist from that of the lawyer. The lawyer is the man skilled in municipal law; the jurist is the man learned in the general principles of jurisprudence; the legist is the man who, having the skill of one and the learning of the other, is enabled to apply the principles of jurisprudence to the improvement of municipal law; and to cast them into the form fit for actual legislation. Hence, a man may be a great lawyer who is neither jurist nor legist; there can be no legist who is not both a lawyer and a jurist. Coke was a mere lawyer, and nothing more. Bacon was a lawyer, a jurist, and a legist; and so perhaps was Hale. In modern times, this country has had great lawyers, as Blackstone, Eldon, Mansfield, but one great jurist such as Stowell, and, partly from the practical character of the profession, and—partly from the defect of legal education—it has had no one deserving the name of a legist. The reason is obvious; we had few jurists, and none who were not practising lawyers, and these had no leisure to become legists. Nor would all jurists have the ability, for it requires a certain capacity for

* The Complete Works of Edward Livingston on Criminal Jurisprudence. 2 Vols., New York.

the expression of legal ideas in practical legislation, which is not always united even to great juristical learning. We have had a great legal theorist—Bentham—but he was far from being either a lawyer or a jurist; he knew, in fact, scarcely anything of law, and hence it was that his speculations were so diffuse and unpractical.

It has been the glory of America, from the union of the practical character of the Anglo-Saxon race with better provision for legal education and a greater desire for expansion and development of legal principles natural in a new country, to produce at once greater jurists, and also to produce the great legist, at once philosophical and practical, enlightened in conception, and skilful and wise in execution. In a word, America has not only produced Story, Wheaton, and Kent, but has the greater glory of producing Livingston.

These works were composed by Livingston half-a-century ago, not as a volunteer, or as a mere private writer, but at the desire and request of the legislature of Louisiana, where he was well known and highly respected as a learned and able lawyer, and they consist of several codes of law, of procedure, of evidence, and of discipline, framed in a practical form for actual legislation, accompanied by introductory dissertations, fully expounding the principles on which they were framed. They embody all that the most enlightened principles could dictate upon all these subjects, which are discussed, said the late Chief Justice Chase, "with a keenness of insight, clearness of statement, and a force of logic which mark the highest genius." We entirely concur in this opinion of the late American Chief Justice. And we heartily agree with the Association to whom we owe this fine edition, who declare themselves happy in being enabled to give to the world a new edition of the writings of an American jurist and philanthropist who has done so much to illustrate and advance his age in one of the highest and noblest departments of civilization."

We so highly appreciate the merits of Livingston's works that we are anxious to claim for authors of our own country some

share in the credit of having originated the ideas and principles which he so ably carried out and embodied. The late Chief Justice Chase ascribed Livingston's labours to the impulse given to the progress of ideas at the latter end of the last century, and especially by the French Revolution, and the publication of the Code Napoleon. This, we think, is a very erroneous notion, and one which is far from the truth of history. The Chief Justice falls into the common error of dating a great movement at some particular time, or tracing it to some particular person, as to Napoleon and Bentham. But all great movements are gradual and progressive, and this is one of the most interesting studies in history. In the middle of the 17th century the celebrated Ordonnances of Law XIV., effected vast improvements in the law and judicial system of France, which were carried still further under the auspices of the great Chancellor D'Aguesseau, and before the fall of the monarchy, as regards the criminal jurisprudence, the advancing spirit of humanity and intelligence found expression in France in the great work of Montesquieu. His chapter directed to show that penalties should be proportioned to crimes, "*que les lois criminelles tirent chaque peine de la nature particuliere du crime*") Liv. xii., c. 4), embodied the first principles of a good penal code: and the framers of the Code Penal had evidently studied that chapter, for they often quoted it in their exposition of the principles of this code, as, for instance, with reference to the penalty of death. In the middle of the last century, Frederic of Prussia, following the example of France, codified the law and procedure of his country. Thirty years later Austria also codified her law; and in the meantime great French jurists, like Dumat and Pothier developed and systematized French law. In the middle of the last century a code penal was published in France, and Beccaria inculcated humanity in the punishments of crimes; and in our own country nearly a century ago, Mr. Eden published his enlightened Essay on the Principles of Penal Law, which was based on principles and

ideas to be found in the works of Montesquieu and Beccaria, principles and ideas which had long been disseminated both in this country and the continent. In Mr. Eden's book, published in 1771, all the modern general principles of a humane and sensible criminal code are to be found. Thus, for instance, as to capital punishment: "Nothing but the absolute necessity can justify the destruction of mankind by the hand of man." Also as to the punishment of transportation, he doubts whether it was deterrent, and as to corporeal punishment, as flogging or other corporeal pains or ignominy, he says, "let it be used with discretion and moderation, for the extirpation of vice;" which is exactly the way it is now applied for the punishment of garotters or offenders against women and children; also as to crimes, he observed, that it was necessary to consider the several species of crimes, and their different gradations, was to apportion the punishments proper to each. "Let the penalty," says Eden, "be proportioned to the denomination of their vice." This is the fundamental principle of penal code, and on which all the rest depends. And then Eden distinguished between crimes really to be regarded as such, and mere offences against positive law, such as we call misdemeanours, and also as to procedure. Mr. Eden had a very interesting chapter on the gradual improvement of criminal procedure, and the spirit of the observations was in favour of following out the course of improvement. In accordance with the view of Beccaria, he was opposed to the compulsory examination of the accused upon oath,—the great distinction between continental systems and our own, which, as he showed, had gone rather to the opposite extreme of a jealousy even of voluntary admissions. And he pointed out the danger of receiving evidence of words supposed to have been spoken by the accused, with reference to his alleged criminality, which he said should be received with great caution and distrust.

These specimens of Mr. Eden's work may suffice, and it must be borne in mind that it was published in 1771, before

the American Revolution, and nearly 10 years before the publication of Bentham's *Enquiry into the Principles of Legislation*. No one can doubt that it was read and studied by American lawyers with attention, and among others by Livingston. And, indeed, it is evident from Livingston's own works that he had read Eden's book.

This does not at all derogate from the merit of Livingston, and our American friends will, on the contrary, perceive that our endeavour to claim for an English author the credit even of suggesting ideas to their great jurist, is the highest possible compliment to him. We can do no more than claim that credit for the English writer of having originated or suggested some of the true ideas and principles on the subject, and that in a very crude and cursory way. The credit of having worked out and developed those principles and ideas, in a manner at once correct, complete, and comprehensive, in the form of masterly, clear, and elaborate exposition of principles, coupled with their embodiment in clear and accurate codes, ready to be enacted into law, belongs, beyond a doubt, to the great American jurist, Livingston. And how great that merit must be will be manifest when it is borne in record that the work was achieved half a century ago, before the labours of Romilly and Peel had been commenced, and thirty years before Macaulay earned so much credit, by the construction, for India, after many years of labour, of a Penal Code, which after all was not till many years later, indeed quite recently, enacted into law.

Nor was Livingston beholden to Bentham. Without going so far as Archdeacon Hare in thinking Bentham a "bad man," beyond all doubt the Archdeacon was right in saying he was "full of arrogant, overweening contemptuous self-conceit, and looked with vulgar scorn on the wisdom of modern times and of his own," that what made him so self-confident was that his knowledge was only half knowledge, "and that thus he fancied he had a monopoly of truth." Even Austin, a man whose mind and whose know-

ledge were far superior to Bentham, is obliged to acknowledge this to a great extent.

In style, as in character, Bentham was as far inferior to Livingston, as he was to our own Austin. The principles he advocated have acquired his name, but he neither originated them, nor even popularised them. He impressed a small select circle of disciples, who did far more than he did to diffuse and popularise his ideas; men like Mill and Austin, for instance. The conceit of Bentham's character spoiled his style; he was far too diffuse, eccentric and obscure.

All that Bentham did was to diffuse the ideas of natural reason in this country; but then so disguised in strange terms and verbose language, as rather to repel than impress, and even the work of popularizing the subject was done not by Bentham but by Brougham.

Livingston was far superior, as a jurist, to Bentham, Austin, or Brougham. His intellect, like Austin's, was of a higher order than Bentham's, and though not so vast and powerful in its grasp and varied in its stores of knowledge, in the department of law and jurisprudence, and especially procedure, he was far superior to Brougham. His compositions are perfect in style, as they are at once practical and philosophical in their matter; they are clear, copious, and correct, to a degree unequalled by any jurists except Kent and Story. There was no conceit in the character of Livingston; he was a practical, sensible man; not, like Bentham, a mere framer of abstract notions and speculative ideas; he was a sound and learned lawyer; while at the same time, his mind was enlightened and enlarged by the light of sound principles, he at the same time had the practical sense, knowledge and experience necessary to work those principles out in legislation. Hence his works are really valuable both to the lawyer and the legislator, and are a store-house of sound legal principles. No doubt Livingston derived some light from the French Code; but it was a light derived from earlier sources. It was not until 20 years after Mr. Eden's book that the first

French Code was framed; and it was obviously framed chiefly from the same source as those from which he had derived his ideas, Beccaria, and Montesquieu, and very little indeed from Bentham. In their exposition of the code, its authors refer repeatedly to Montesquieu, and Beccaria, and only once to Bentham, who borrowed his own ideas from them, and only gave them new expressions and applications.

Thus the great work in which Livingston laboured for the improvement of jurisprudence, was rather the result of a movement which had been going on for more than two centuries, and was part of the gradual progress of the human mind, following on the great invention of printing, and the consequent diffusion of ideas and interchange of sentiment, the increase of moral and intellectual influence. It was natural that in a new country like America this movement should extend itself, and that its progress should be more rapid than in old countries more fettered with old habits and traditions and ideas, and hence the course of improvement and systematization in the law was more rapid in America than in England. Thus it was that half a century ago the Legislature of the State of Louisiana, where the law was in a confused state, partly French and Spanish, and partly American, desired Edward Livingston, a learned lawyer, versed in the general principles of jurisprudence, to prepare a system of Penal Law and Procedure, and after the labour of three years he completed the work, contained in these volumes. Yet the State Legislature did not after all give it the sanction of law. "Objections of detail and fears of possible consequences, combined with sluggish indifference, and the force so difficult to overcome in legislative assemblies, combined to prevent the adoption of the comprehensive scheme." But though, says Chief Justice Chase, the State for which the codes were prepared neglected to pass them into law, they "proved a treasure of suggestions to which other States were indebted for useful legislation." A complete edition of the codes and reports was published in Philadelphia in 1833.

The works of Livingston on criminal jurisprudence consist of the system of Penal Law, prepared by Livingston for the State of Louisiana, comprising a code of crimes and punishments, a code of procedure, a code of evidence, a code of prison discipline, and a book of definitions. To each of the four codes an elaborate report was prefaced, in which its principles, purposes, and provisions were fully expounded. Two elaborate preliminary reports, one on the plan of a penal code, the other on the system of penal law, precede them. The most important portions had previously been printed in England, France, and Germany, and now a handsome and complete American edition is published, while a new edition is about to be published in France. The subject is one of vast and of permanent interest, for it affects that question which is of daily and hourly recurrence in criminal courts, what is to be the proper *ratio* of punishment. The inequality of sentences often shocks common sense, and it is all from want of a principle.

The great principle laid down by Livingston is that the end of punishment is the prevention of crime. But this principle alone would not suffice; for in spite of all that philanthropists may say, it is impossible not to believe that death is a more deterrent punishment than any other. Yet no jurist would now contend that it is admissible to execute men for horse-stealing, or would be satisfied with the logic of the English Judge, in an answer to a convicted horse-stealer, "you complain of the cruelty of the law, you are not to be hanged for horse-stealing, but you are to be hanged, that horses may not be stolen." Clearly, therefore, some other principle must be called into operation to reach a satisfactory conclusion as to punishment of crimes. And surely that principle is, that punishment ought to be proportioned to the quality or nature of the crime, that is, to the degree of criminality it involved. Would any number of larcenies justify the execution of a man? or would any degree of prevalence of the offence justify the infliction of the capital penalty? This is a question never fairly faced by

any of the theorists on the subject, and yet it is vital and fundamental to the true theory of penal law. No theory can be satisfactory, no principle can work, which does not afford us a good working guidance as to the proportion of punishments, for this proportion must have reference to the nature and the degree of the crime, its heinous character, and the kind of injury it inflicts. One great cardinal principle was laid down by Livingston—that is, a distinction between crimes and misdemeanours, between rape, robbery, and murder, and a mere breach of some positive law, a violation of regulations of revenue or police, an assault, a libel or a fraud. But is there not another great principle that no offence against property can equal a crime against the person, and that no crime against the person can equal that of murder? The principle of proportion necessarily implies a scale, and as you cannot inflict a heavier punishment than death, it follows that this must be reserved for the worst crimes. Livingston, however, desired to abolish it entirely; but his countrymen would reserve it for murder, treason, and rape. In this country we have gone a step beyond this, and reserve the dread penalty of death for murder, and virtually for the worst type of murder. Even in treason, if there has been no murder or attempt, or design to commit it, we never dream of inflicting the capital punishment. And this follows necessarily from the great cardinal principle—that the object of punishment is the prevention of crime. For if treason, robbery, or rape, are capital, then the criminal has a direct temptation to add murder to his other crime in order to escape detection. The same principle is applicable to the next severe grade of punishment—penal servitude for life, that it ought to be reserved for the next grade of crime, just below the worst, the less heinous forms of murder. And so of other periods of penal servitude, they should be proportioned to various grades or degrees of guilt.

But the great difficulty is in secondary punishment, among which Livingston enumerates simple imprisonment, trahs-

portation, labour on public works, chains, handing stripes. Transportation we have been compelled to abandon; penal servitude with us is labour in chains on public works. Simple imprisonment is, Livingston thinks, very ineffective as a punishment for crime, nearly the worst. If solitary it is too severe for most offences, if not solitary it is likely to become a school for vice. Here is one great source of difficulty, and here arise the great necessities of the age, Prison Discipline.

There is another important branch of the subject, and that is criminal procedure, which in this country is of greater interest because our procedure is extremely clumsy and ineffective. These are the two most important subjects of Livingston's works. It is to be observed that these works of Livingston were written half a century ago, before our criminal law had been improved by the labours of Romilly and Peel, and therefore his views of penal law are not of such interest now as his ideas upon prison discipline and criminal procedure. These subjects are treated with great copiousness, clearness, and good sense, and the principles of good systems, whether of procedure or of prison discipline, are here to be found explained and enforced in the clearest and most powerful style. As to prison discipline the cardinal principles applied are separation and classification, and the adoption of such punishments as may at once be deterrent and tend to improvement; labour, for instance, hard, and yet teaching the convict some useful occupation. In this department we believe we have in this country made much progress since Livingston wrote, though there may be still room for improvement.

But there is another branch of the subject, that of Procedure, in which we fear we have made little or no progress; and this part of Livingston's work is therefore of undiminished interest and importance. What he says, for instance, as to the examination of the accused is marked by good sense, and takes a safe course between the extremes of English and continental systems. When he wrote, the

prisoner practice prevailing in Louisiana, was similar to that which is followed in this country, that is, the accused was *cautioned*, so as to invite him to silence. This, Livingston thought absurd, and he also thought that an unrestrained right of interrogating is very apt to produce evasions and catching questions. He, therefore, proposed a prescribed and restricted mode of examination.

"A prejudice, but it appears to me a groundless one, and certainly very favorable to the guilty, ~~exists~~ against procuring testimony from the judicial examination of the party accused before a magistrate, and yet without scruple we admit testimony of his informal and private confessions to individuals, as if he would be more apt to inculcate himself without cause when put on his guard by the admonition of the judge, and a knowledge of the consequences, than he would in a loose conversation, which he might imagine would not be repeated. Or as if the record of what he has said, corrected and signed by himself after due deliberation, were not as high evidence as the declaration of a casual who may misrepresent or misunderstand. After weighing the arguments on the question, I have come to the conclusion that it would be unwise to abandon the advantage to be derived from examination of the accused, but at the same time that justice refuses us to reduce to the lowest degree the two evils inseparably attached to this mode of proceeding, and I thought that this might be effected by restricting the magistrate to a prescribed form of interrogatory, so drawn that no innocent person could be entrapped answering, while, at the same time, evasions or untrue answers might frequently lead to the detection of guilt; and, to avoid inaccuracies in recording the answers, the interrogatories are pointed only to such simple circumstances as can be detailed with the greatest simplicity of language, and they are not to be considered as complete until they have been corrected and signed by the party. If we add to this that he has the assistance of counsel and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or incriminate, to his prejudice in the preliminary examination.

Indeed, the only question is whether the power of examination would not be too much limited. But, at all events, it will be seen that Livingston took a moderate and carefully guarded view, avoiding the evils of either extreme, the absurd and clumsy inefficiency of the English system and

the fearful severity and ensnaring stringency of the continental.

On another vital point, the necessity for unanimity, Livingston pronounced rightly in favour of unanimity, pointing out, truly, that when the verdict of the majority sufficed the jury consisted, as grand juries now do, of twenty-three, so that a unanimous verdict of twelve was always required, and he vindicates the necessity for unanimity in some number not less than twelve, on the broad, solid, sensitive, ground that the evidence that subjects a person to conviction and penalty for a crime ought to be so clear as to satisfy at least that number of men.

In Livingston's treatise on Judicial Evidence, he entered into the most important parts of civil procedure, and he advocated the great vital principle laid down in the last century by Lord Chief Baron Gilbert, the great master of the Law of Evidence, and supported by the authority of the Civil Law and the practice of our Courts of Equity, that the statements of a party in his own favour are not credible, and are only reliable when against his own interest, and therefore he proposed that the plaintiff should be compelled to verify his claim on oath, but that this oath should not itself be evidence, and should only be required in order to act as a safe-guard against vexatious claims, and to expose the suitor to the test of cross-examination, and next that either party should be liable to examination—that is adverse examination—by the other, or by the judge. This is the true principle, and the principle on which in Equity the defendant was interrogated, and had to answer upon oath; and it is the principle on which at law and Equity either party can now interrogate the other. It was indeed departed from in our law when the Act of 14 and 15 Vict. made the parties to a suit "competent and compellable to give evidence:" at all events, on the construction put upon it by the judges, that either party was competent and allowable to give evidence on his own behalf, which we shall always consider an unfortunate construction, as it has

tended rather to the increase of perjury than the discovery of truths. However, as to interrogatory before the trial or hearing, the principle of Livingston is now adopted in our courts, and it is an obvious anomaly which allows the parties to do that at the trial which they cannot before the trial, give evidence in their own favour. The answer in Chancery was never evidence for the defendant, though it would be evidence against him, and it is only adverse evidence of a party which is worth anything.

There is another subject on which Livingston showed equal good sense. With reference to contempt of Court, he wrote :—

“The power of punishing for contempts, in the extent to which it has been carried, it is believed has never been vindicated by the plea of necessity. Its repugnance to the fundamental principles which secure private rights in the administration of justice is so apparent that no other argument can possibly be used. There is nothing, from a rude word up to the most violent opposition to legal authority, which may not be brought within the law of contempt. Now, I put it to those who contend that there ought to be this power in the Courts, what will secure a man against its exercise in the hands of a vain or vindictive judge? The person offended is made the only judge, and, lest his resentment should have time to cool, he is armed with the power of summary process. Judges are men, their passions will be more readily moved by real or fancied results than by injuries, and nothing can be more at variance with justice than passion. Words, which a man of cool and considerate disposition would pass over without notice, might trouble the serenity of another more susceptible in his feelings, or irritable by nature.”

There is great truth in all this, and it entirely accords with the view we have taken of the question. It is a good specimen of the sound sense which characterises all Livingston's views. We need say no more as to the value of his works, and we hail the edition of them as a boon to the public.

III.—THE TICHBORNE IMPOSTURE, AND THE TRIAL BY JURY IN ENGLAND, AND AS AMENDED IN OUR COLONIES.

BY JOSEPH BROWN, Q.C.*

THE Tichborne trials, Civil and Criminal, are so remarkable an example of the trial by jury, as to furnish an appropriate occasion for some criticisms on that institution, which will be the more in season, on account of the late Attorney-General's Bill for the Amendment of the Jury Laws*—a measure which will probably be re-introduced in some form in the present Session of Parliament.

It must be allowed that the Tichborne cases exposed the trial by jury to a very severe test—in fact, one in some respects without a parallel—and as the ultimate result was right in both cases, it will be said that the jury have triumphantly stood the severest strain ever put upon that tribunal.

But the public have a right to require something more of a judicial tribunal than merely arriving at a just result in the end. This measure of success might have been accorded to the Court of Chancery even in the days of Eldon, when complaints were loudest of the intolerable delay and expense of Chancery proceedings. The public expect, and justly expect, that every tribunal shall exhibit as much despatch and economy as is consistent with doing the business in a satisfactory manner, and shall avoid torturing the suitor by needless delays, or ruining him by immoderate expense; and moreover, that it shall be so constituted and conducted as to give the party who is in the wrong the smallest chance of escaping the award of justice, and not to encourage him to

* It is to be hoped that the late Attorney-General's promotion to the Chief Justiceship of the Common Pleas, and to the House of Lords, as Lord Coleridge, will not prevent him from again endeavouring to amend the Jury Laws. We are glad to see that Mr. T. W. Erle, the Associate, who drafted the Bill for that purpose, has not ceased to interest himself in the subject. See p. 178, Ante.

speculate on the uncertainty of the result, or on a breakdown of the proceedings ; finally, that it should deserve and secure the confidence and respect of the intelligent part of the public. How far did the late trials respond to these requirements?

The scene which occurred at the outset of the first trial was anything but creditable to the institution, for it was found all but impossible to get jurymen to serve, and it was not till after a delay of some days, nor till after the judge had threatened to impose a heavy fine on the absent jurors, that eleven jurymen were got together, with which number the parties had to be content. It is a strange mode of getting jurors together, to whip them in by pains and penalties like a pack of hounds. It does not tend to increase the public respect for them.

But the difficulty of getting twelve gentlemen to try such a case is not to be wondered at, when it is considered that it took every man away from his own business for five days in a week for months together ; nor is it reasonable to expect that men should make such a sacrifice for the sake of settling the disputes of other parties. In truth, this consideration leads right up to the conclusion that the only fit tribunal for a very long cause, is one composed of men who have no other business to attend to, whose business in fact is to try causes—in other words, a tribunal of judges. There would be no difficulty in getting them together, nor any postponement on account of their absence, unless you absurdly insisted on having twelve judges, instead of twelve jurymen.

This brings us to observe the mischief of insisting on having twelve men to compose a jury, instead of some smaller number, say five for example, as in the County Courts, or seven or four, as in some of the colonies. Just consider some of the consequences that might have resulted in this case, and which have resulted in many other cases, from the superstitious regard for this *sacred number twelve*. In the first place, the trial might have failed at the very first step for want of twelve jurymen, although five or seven or more were

present, and ready to do their office. In the course of the writer's experience, many trials have been rendered abortive because twelve gentlemen could not be got to attend as jurymen. Frequently one of the parties has an interest in stopping or delaying the case, and will not consent to a jury of less than twelve. In a criminal case, no such consent would be given or would be available. When this happens, it not only causes great additional waste of money to the parties in getting their witnesses, lawyers, and counsel together again, but many times it has prevented justice being done at all, by the death of parties, or witnesses, before another turn for trial came round.

In the next place, twelve persons are a very inconvenient number for deliberation. If the jury are really to form any opinion of their own, and are not to throw all the business of deliberation on the judge, twelve are far too many to do it properly. How is it possible for twelve men sitting in two rows in a couple of pews, and quite new to the work, to consult each other fully or freely as to the details of any long cause. If you watch them, you will generally see them at the end of the case divided into two or three groups, each knot of three or four putting their heads together, and then a deputy of one knot speaking to the deputy of another knot, and so on till all three deputies concur, or one of them gives way. This shows that three or four or thereabouts, are the largest practical number for a real consultation. In a consultation of counsel on a difficult cause, two or three at most are found to be useful. So it is with a consultation of doctors. In an assembly for discussion, it is well to hear all varieties of opinion, but in a trial at law, the discussion and argument of a case have been exhausted by the counsel and the judge before the jury have to dispose of it, and their office is really limited to weighing what they have heard, and determining which scale preponderates. If they differ and the evidence has to be reviewed by them to bring them to one mind, is this likely to be done better by five or by twelve? The smaller number would clearly have more chance of expressing their

views fully and of being heard without interruption by the others.

In cases where many documents and accounts have to be examined and compared and details gone into, experience has shown that it is impossible for twelve men to do it, and such causes are obliged to be referred to one, two, or at most three referees, who can sit at a table, and patiently examine documents and figures and consult each other.

It therefore appears that the custom of requiring twelve men to form a jury, renders full deliberation and conference of the whole number very difficult, and sometimes impossible, that the difficulty of getting them together often frustrates a trial entirely, and that this excessive number increases the expense of trials to no purpose, and compels men in business to leave their occupations without any real call for it.

This complaint admits of so easy a remedy by reducing the number to five, as in the County Courts, that nothing but inveterate habit, or a superstitious dread of touching the jury with irreverent hands, stands in the way of reforming it. For the real reason why a numerous jury was preferred by our fore-fathers no longer exists, namely this, that the jury were anciently both neighbours of the parties and witnesses to the facts; and the reasons assigned by Lord Coke for the number twelve, might be satisfactory to his Master, James the 1st, but would not pass for much now-a-days. For, says Lord Coke, there were twelve apostles, twelve stones, twelve tribes, &c. We might as well have a jury of seven, because there were anciently seven sages of Greece, seven planets, and seven wonders of the world, or a jury of four because there were four evangelists, four-cardinal points and four elements.

The next remark to be made is that both trials, with all the enormous expense incurred in them might have been thrown away, and Justice baffled, by the death or illness of any one of the jurors. In is true that when an adjournment of some months was made in the civil action, the parties agreed that the death of one or even two jurors should not stop the trial;

but this agreement was optional, and of course it would not be made in a criminal case : as the law now stands, if any one of twelve jurymen is taken with serious illness or death during a trial, the whole proceedings must be gone over again with a new jury.* In long trials, this sort of accident has occurred more than once, though it admits of the easiest remedy, namely by going on to the end with the remaining jurymen. This would be simply acting on the maxim, "*Actus Dei nemini facit injuriam*," and this is what is done when one of several judges who have heard a case argued dies before judgment. Here again the inconvenience is aggravated by the number twelve, as the more you have, the greater is the chance of some one of them being taken ill during a long trial.

But the most conspicuous feature of all in these two trials is the enormous length of time they occupied, which is without a parallel in our annals, and which of course involved an equally enormous expense. A large fortune was in fact spent in each case. Now, although it be true that these cases of false personation of the missing heir to an estate do generally involve a very long enquiry, as we see in the French cases of Martin Guerre, of the false "Caille," and in the Indian case of the Rajah of Burdwan, the reasons of which have been well explained by Mr. Moriarty, in a recent publication,† yet it is not the less true that the lawyers in Westminster Hall, and the judges who tried both the civil and criminal cases, had seen clearly through the Tichborne imposture long before the jury gave any intimation of having done so. In truth the case presented to every experienced lawyer such staring and unmistakable marks of fraud and imposture from the very first,‡ that if the civil case had been tried by the late Chief Justice Bovill instead of a jury, there

* *Rex. v. Edwards.* 4 Taunton. 311. *Ann Sealberts case.* Leach, 702. *Rex. v. Stone.*

† "On Personation and Disputed Identity, and their tests." Stevens & Haynes. 1873.

‡ See "The Tichborne Case compared with previous impostures of the same kind," by J. Brown, Q.C. Butterworths, 1874.

is no doubt that that very acute and penetrating judge, who had himself been counsel in the Smythe imposture, would have dismissed the case after the cross-examination of the ignorant impostor, who neither knew the native tongue of Roger Tichborne, nor the name of his mother, nor the situation of his estate, nor the books he read at school, nor the name of his favourite game, nor the face of his sweetheart. So it is pretty plain to those who watched the criminal trial, that if the judges of the Queen's Bench had had to decide it, the evidence would have been greatly shortened by an intimation that a great deal of it did not weigh a feather, and no reply or summing up would have been called for.

How can any one read the elaborate summing up of the Lord Chief Justice, and observe the infinite pains which he took to explain every part of the evidence to the jury, and to point out the irresistible signs of fraud, perjury, villainy, and imposture which stamped every feature of the big butcher's conduct and testimony, without seeing that while the whole thing was a transparent imposture to the judges, they had a serious apprehension that some of the jury were unable to see through it. What else can explain the fact that the judge was obliged to laud the trial by jury, to deprecate the disgrace and danger which an erroneous verdict would bring upon it, and to exhort the jury that no one or two of them should stand out against the others, without being able to give the strongest reasons for their dissent. All this labouring of the jury as the old writers term it, was evidently thought both right and necessary by the greatest judge in England to avert the danger of a disgraceful failure of justice.

Now if the above remarks are founded on truth, a great deal of the enormous expense incurred by the prolongation of both trials for months together was thrown away, and must be set down to the debit of the trial by jury. It is well for the infant heir that the estate was a large one, or he would have been ruined by it. The next time such a civil cause occurs, the property may be much smaller, and may be wholly engulfed in the expense of the litigation. And the next time

such a criminal prosecution occurs, an economical minister may wholly refuse to spend a hundred thousand pounds in conducting it, and rather allow the impostor to escape.

If the writer were asked what inference he would draw from the above observations, he would not conceal his own opinion that it would be better if trial by jury were limited to those cases in which it has some peculiar excellence, and not applied to cases where it serves no useful purpose, but is the cause of great delay and useless expense to the parties, and oftentimes of a failure of justice. In the civil action, if the inexperience of the jury, or the dullness of some of them prolonged the trial to three times the length which it ought to have taken, they thereby inflicted on the party who was in the right, a needless expense of perhaps £40,000, which would have ruined a smaller estate.

It seems as if the people of this country had been persuaded by the eloquent declamations of such men as Erskine and Brougham, who lived in times when the liberty of the press and of the subject found its best safeguard in a jury, that therefore we cannot have too much of it, and that because trial by jury is an excellent privilege when a man is indicted for a political offence, it is equally good when he has to try the validity of a patent or the title to an estate. But it is as great a piece of quackery to say that trial by jury is good for all causes, as to say that Morrison's pills cure all diseases. A knife is the best thing to cut bread, but would be very awkward to shave with. Would any one ask a carpenter to repair his carriage when he could get a coachmaker to do it? Why then should we employ laymen to try a long and difficult cause, when we have got an expert Judge at hand trained and paid for the work, who would do it much better, and in half the time.

Trial by jury may be a very good thing, but it is possible to have too much of a good thing. As you have too much sunshine in Greece, and too much rain in England, so you may have too much trial by jury; and with all respect to such champions of liberty as Erskine and Brougham, there is

a large class of cases where no public rights are in question, which would be much better and quicker and cheaper tried by judges. Amongst them, the writer would include the Tichborne case. If it be said that it is not satisfactory for a single judge or even two judges to dispose of the claim to so large an estate, the answer is that a single judge in Chancery decides cases of very much larger amount, subject to proper powers of appeal, and the public have not found cause to complain of it.

It is reported in society that one principal reason why the jury allowed the Tichborne imposition to be kept up so long, was the necessity of their being unanimous;—that nine or ten of the jury saw through it at an early stage, but that there were one or two who could not see it till Sir John Coleridge in the one case, and the Lord Chief Justice in the other, had cleared away all doubts. It is difficult to read the earnest appeals made by the Lord Chief Justice to the jury upon the duty of a juryman to distrust his own opinion when it should differ from that of the majority, without concluding that his Lordship had reason to apprehend there were some dissentients in the jury.

If this be so, it furnishes another proof of the consequences of requiring a unanimous verdict. One or two dull jurymen may protract a clear case, to the great expense of the parties, or if they are obstinate and have tough stomachs, they may compel the others to give way and defeat justice entirely, as has too often happened. And if you will have twelve men taken at random, there is great risk of your getting one or two dull fellows in the lot.* If the verdict of ten out of twelve would suffice, they could not do so much harm.

But there are other dangers than dullness in exacting a unanimous verdict. There is and there can be no adequate

* The writer has been informed on the best authority, that it was only by chance that the Tichborne Jury were not summoned from Whitechapel, in which case they would have consisted chiefly of butchers and publicans. (See the instructive and able article "On the Qualifications of Jurors" by T. W. Erle Associate, p. 173, of this Magazine.) A jury of this kind might have given the big butcher a chance.

security that one or more of the twelve may not be a secret friend of one of the parties, or may not have had a bet on the result of the trial, or may not have committed himself to strong and declared opinions on the merits, which he cannot without shame retract. Imagine the public scandal and disgrace that would have followed the discovery of a verdict frustrated by a jurymen who had a bet on the result—or who had been a partisan of the big butcher. Imagine also the hardship and indignity inflicted on ten or eleven honest and intelligent men, earnest to do their duty, when they have to consult together at the end of such a great case, and find all their efforts and arguments frustrated and wasted by the immovable obstinacy of some one man whose stupidity is impenetrable or whose prejudice is proof against every argument and remonstrance. Is this a position in which any educated gentlemen deserve to be placed, who give up their time to the public?

This practice of requiring a unanimous verdict, is at variance with nearly all our other institutions. For in almost every deliberative assembly but a jury, a majority suffices to determine every question. It is so in every public meeting, in every Corporation in the kingdom, and in both Houses of Parliament. In fact a simple majority decides claims to millions, or the question of peace or war—but it will not do to decide a claim for a railway accident, or the title to a cottage! What makes it more singular is, that in the old times when juries first began, a majority of twelve out of a greater number were sufficient to give a verdict, and to this day a majority of a Grand Jury and a Coroner's Jury suffices. In like manner a majority of the judges suffices to decide any matter, whether it involve life or death or character or estate. Moreover although a majority of a jury can do nothing in England, it is quite different as soon as you cross the Tweed. In Scotland, a simple majority can condemn or acquit any criminal, only you must have fifteen jurymen. In civil cases, the Scotch jury consists of twelve men, but if they cannot agree after wrangling for three hours,

the majority carries the verdict. This contrivance has the merit of securing a certain amount of deliberation, which you would not always secure without it, if juries could at once say, seven of us are agreed to find for the Plaintiff or for the Defendant. But one does not see why eight Englishmen should not be enough to convict a villain, as well as eight Scotchmen.

Most of our principal colonies, which are not so fettered by ancient custom as the old country, have set us a good example in amending the defects in the jury system which we have complained of. New South Wales led the way, so long ago as 1844, by enacting that all actions should be tried by a jury consisting of four special jurors—unless the court should make a special order for twelve—and that after six hours' deliberation, the verdict of three out of the four should be taken.—(New South Wales Act, No. 4 of 8 Vict.)

Tasmania followed in 1858, and enacted that in civil actions all issues should be tried by a jury of seven special jurors, and that after three hours' deliberation, the verdict of five should be taken.—(Tasmanian Act, No. 45 of 21 Vict.)

South Australia, in 1862 (Act No. 1), adopted a jury of four in local courts, of whom three carry the verdict—but as far as the writer knows, the old system continued in the Supreme Court.

The Victoria Colony in 1865, adopted a special jury of four for the trial of all civil actions (Act of 28 Vict., No 272), but allowed either party to have twelve if he chose to pay for it.

New Zealand in 1871, adopted the verdict of a majority of five-sixths in civil actions after six hours' deliberation (Act of No. 44 of 35 Vict.), but made no other alteration.

Lower Canada in 1830, adopted the verdict of five out of twelve (Act No. 83, Vict. 26.) The Cape of Good Hope in 1854, enacted a jury of nine men, and took the verdict of six after one hour's deliberation (Statute No. 7 of 1854), and Jamaica in 1856, established juries of seven men, and accepted the verdict of five.

Oh! benighted and sacrilegious colonies! What will

become of you after abandoning the custom of your forefathers, the sacred number twelve, and the starved unanimity of juries!!

The Tasmanian Statute, requiring a special jury in all civil cases, but reducing the number to seven, and accepting the verdict of five, was introduced and carried by Sir Francis Smith, the Chief Justice of that island. In a communication from that learned judge to a friend of the writer, he gives the reasons for this change and his experience of the results as follows:—

“In the course of many years’ practice before these juries, I became convinced, from close observation, that the number of four was too small, and that of twelve too large for full, free, and calm deliberation. The jury of four was too small, because among so few, a man of comparatively strong will had an undue preponderance being less likely to meet his match than in a larger number, and the instances were frequent, in cases exciting much interest, in which verdicts were recognised as having been unduly influenced by some one juror, who was known to have held a strong opinion on the matter in question. On the other hand, the jury of twelve was too large, because they could not conveniently consult *together*.

“It was well known that the common practice was to talk over the case in knots of three or four, pursuing separate, independent, partial and unsystematic discussions, utterly futile for the purpose of arriving at a general opinion upon the whole case. *The result too often, and almost always in cases of much interest or difficulty, was a compromise which was no real solution of the question in dispute*, and by which justice was more or less frustrated. The mode of selection by striking off names was found to be vicious, by reason of its tendency to leave on the jury the least intelligent men, and those of the least force of character.

“As to common juries, I became convinced that they were useless by reason of incapacity, for the trial of civil cases. On the whole, the conclusion to which I was led was that full, complete, and deliberate consultation would be more likely to be secured by the adoption of a number intermediate between four and twelve. The choice of the number appeared to depend mainly upon this consideration, that it should be the largest number that could conveniently consult all together, and would furnish a satisfactory majority in case of difference of opinion after adequate deliberation.

“The reform which I introduced was accordingly based on these views. It provided that there should be but one mode

of trial for all civil issues, namely : a jury of seven taken from the special jury list, casually selected from the panel by drawing their names from a box. The right of challenge for cause was reserved, and that of peremptory challenge to a limited extent conferred. In case of inability to agree after six hours' deliberation, the verdict of five was to be taken as the verdict of the jury. I chose the number seven because it seemed to me to satisfy the condition above mentioned of being the largest number that could conveniently consult all together. The majority of five to two also seemed a safe medium between being content with too narrow and requiring too large a majority. Compared, for example, with a jury of five or six, it gave rather more certainty than either three to two or four to two, and more facility than either four to one, or five to one. These were the considerations which led me to adopt the number seven ; but it had also the advantage of having been once in operation in the very early days of the colony, long before my time, when for want of qualified inhabitants, juries used to be composed of Military Officers belonging to regiments stationed in the Colonies, such juries consisting of seven. *It has therefore been in operation at least twelve or thirteen years, has fully answered my expectations, and is acknowledged to work well and to be a great improvement upon the former system. There have been no instances that I am aware of, of scandalous compromise ; and the verdicts have generally been satisfactory. The verdict by majority is rarely given but in difficult or complicated cases, or where the evidence is very conflicting and still more rarely is the jury discharged without arriving at a verdict. New trials also have much diminished in number."*

This experience by a Chief Justice of the working of the amended system is particularly valuable, and nothing could be more encouraging to those who advocate a change in our system. One is driven to ask, why is a majority verdict good on one side of the Tweed and not on the other ? Why is it good for Englishmen in Tasmania and Jamaica but not in England ? The only possible answer is, Custom overpowers reason and governs men, even in their most solemn affairs, and always did, as old Herodotus will tell us—

"If all men," says the father of history, "were at liberty to introduce from other places such usages as they should like best, they would yet prefer to retain their own ; every man being strongly inclined to prefer the customs of his country before those of any other. That this is the common sentiment of all mankind, I could prove by many

instances, but shall content myself with one. King Darius having assembled some Greeks who lived near him, asked them for what price they would bind themselves to eat the dead bodies of their parents; and they, answering that nothing would ever induce them to commit so great a crime, he called in certain Indians called Callatians, who are accustomed to eat the dead bodies of their fathers,* and demanding in the presence of the Greeks how much money they would take to burn their parents after death, the Indians uttered loud cries of horror, and begged he would not mention such a thing again. Such is the effect of custom, and therefore Pindar justly says, that custom is the King of all men." (Herod. Thalia, 38).

In the present age however, we have thrown off the slavery of custom in many things which the old lawyers looked on as sacred; we have got rid of the ancient fetters of special pleading—we have admitted the parties to an action as witnesses, we have allowed prisoners to have counsel, and we have actually come to administer equity as well as law in the same cause. After this we cannot despair of seeing a reform in the jury system, and though Lord Coleridge when Attorney-General, was compelled by the opposition of the lawyers in the House of Commons, to abandon for the time the attempt to reduce the number of the jury and to take the verdict of a certain majority, we do not feel discouraged, remembering how many measures of improvement have experienced a similar fate, when brought forward for the first, the second, or the third time. It is however, only by repeatedly pressing the evils of the present system on those who have it in their power to promote the amendment of the law, that we can hope to effect what in the judgment of the present writer would be one of the most valuable of law reforms, and would redeem our system from the reproach of rudeness in constitution, of wasteful delay and expense in action, and of uncertainty in the result.

* The Battas of Sumatra still practice this custom. See Asiatic Researches, vol. x., p. 202.

IV.—TRIAL BY JURY AND PUBLIC PROSECUTOR SYSTEM IN GERMANY.

By EDWARD ZIMMERMANN, LL.D., Solicitor and
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TRIAL by jury in Germany is of very recent origin, and does not extend to civil suits. There is, however, no uniform practice. In some of the German States the "*Constitutio Criminalis Carolinæ*" still forms the basis of criminal procedure; they are in their nature "inquisitorial." They are managed in secret, but minutes of the proceedings are taken down in writing. Consequent upon the popular movement in Germany, in the year 1848, the greater majority of the German States have introduced trial by jury. In Prussia, by a law passed on the 3rd of January, 1849, directing oral proceeding, publicity, and trial by jury, this law was very soon altered and modified, and at all events not amended in the spirit of freedom, by a law dated 3rd May, 1852; all crimes punishable by imprisonment for a term exceeding three years were to be submitted to a jury. Very soon, however, the political value of that law was absolutely destroyed, although the *Prussian Constitution* of the 3rd of January, 1850, in its 94th article, likewise provided that any crime should be tried by jury. The *Prussian Penal Code* of the 14th April, 1851, provided that a crime should be considered any act declared punishable capitally or by imprisonment with hard labor or by confinement for a term exceeding five years, while the Prussian law regulating the press, dated the 12th day of May, 1851, so far admitted an exception (in Art. 27) by requiring that any offence committed by the press declared punishable by imprisonment for a term exceeding three years should be tried by jury. This exemption in favour of the press was withdrawn by a law dated the 6th day of March, 1854.

As regards political offences, a special tribunal without jury was created in Prussia, by the law dated the 25th day of April, 1853, so that offences of a political character, and offences against the law regulating the press, are altogether withdrawn from the jury. At the same time it is to be observed that, in the kingdom of Bavaria the jury maintain a far more important position; offences committed by the press are tried by jury in Bavaria; and very recently the editors of four journals published in Munich, all in the service of the Anti-national Ultramontane party, have been found guilty by the jury. Now, although the field of operation of the jury in Prussia is very limited indeed, the Government has seriously considered the question of further restriction, nay, of suppression of trial by jury altogether. After a general Penal Code has lately been published for all Germany, the next question was to establish a general mode of criminal procedure for all Germany, and in the consideration of such procedure, the question of trial by jury became of vital importance. Of course, innumerable faults were found with the juries, and it was suggested to join lay assessors (*Schoeffen*) with the judges, who should jointly find the judgment. *It was contended that where similar tribunals had been at work, for instance, in the former kingdom of Hanover, where in cases of minor importance a judge was sitting together with two laymen, all three (by majority of votes) finding the judgment, the system had proved satisfactory, but we contend that this is by no means general. We have the opinion of an old advocate in Hanover, who considers the sitting of two laymen together with the judge on the bench a mere farce; an independent investigation or sifting of the case is impossible,* as the laymen act and

* Very recently a case came under the notice of the writer where an aged English widow got in dispute with her landlord in an Hanoverian town about the apartments let to her; the old lady evidently irritated by some real or imaginary wrong done to her by the landlord broke forth in not very complimentary language against the landlord (not actionable in England) and was fined by the judge and two lay assessors with fifty thalers (like seven pounds and a half)!

vote under the strongest possible influence of the judge. Many other plans in a similar direction have been devised; for instance, that the number of laymen should be analogous to the number of jurymen, but that these laymen should act and find their judgment throughout under the guidance and in the presence of a judge. On the other side it has been considered that 25 years' experience of trial by jury is not at all a proper period to speak from, to form a decided opinion on the working of the thing, especially if it is borne in mind that by the introduction of the jury we put an inexperienced jury before an inexperienced court, inexperienced prosecutor, and inexperienced advocate. Is it to be expected that all the judges will look upon this innovation as a boon to justice? Assume for a moment that in England an inexperienced judge should preside over a clever jury, should we feel safe against a miscarriage of justice? But what is the state of the jury in Germany? in practice only for 25 years, brought up in the old secret inquisitorial system where everything was brought down in writing, on the erroneous supposition that that was the safest form of protection against error and mistakes: the jury is looked upon by the Government as well as by many members of the profession, with distrust, sometimes treated with neglect, so that every one is only anxious to escape such unenviable position. Nevertheless the feeling in the mass of the people has been expressed strongly in favour of trial by jury as soon as it became known that there was a movement to do away with the jury, and it seems pretty certain that in considering a common code of criminal procedure for Germany, the idea to substitute lay-judges in lieu of the jury has been positively abandoned. It is quite certain that the constitutional development of trial by jury is for the present still based on very slender grounds, and that many prejudices must die out before a German will be able to boast of a barrier by trial of jury, "between the liberties of the people and the prerogative of the Crown."

Now as regards the general qualification of the jurymen we find the above mentioned Prussian Law d. d. 3rd January, 1849, provides (art. 62) that to enable one to be a jurymen he must be a Prussian subject, (a jury *de medietate linguæ* being unknown to the Prussian Law) ; 2, thirty years of age ; and 3, in the full enjoyment of his civil right. There are numerous offences punishable with a partial or total loss of civil or honorary rights ; and no one is competent to sit on a jury who has lost any of these rights. A person judicially declared a lunatic or of unsound mind, or who by the court has been pronounced a spendthrift, or a person deaf and dumb who has been placed under guardianship, thereby being unable to exercise his civil rights, a person become bankrupt, but not discharged, is unable to serve as a jurymen ; 4. he must be able to read and to write ; and 5, be resident in the parish. They are considered incompetent to serve as jurors ; who are 1. the secretaries of state and under-secretaries ; 2. judges, public prosecutors and their assistants ; 3. the presidents of governmental boards, the directors of boards for collecting the Revenue, governors of Counties, chiefs of the Police ; 4. all military persons in active service ; 5. ministers of any creed ; 6. schoolmasters engaged in elementary education ; 7. servants ; 8. persons above seventy years of age ; 9. all persons who are not charged with classified income tax, or who do not annually pay at least 18 dollars classified tax, or 20 dollars land tax, or 24 dollars trade tax, advocates, attorneys, and notaries, professors (duly nominated), physicians regularly admitted, and all public officers admitted by the king directly, or who are in the receipt of an annual salary of 500 thalers. It will, however, not affect the validity of the proceedings if any such unqualified person has been a member of the jury ; and it is not a matter for investigation on the part of the Court. The lists of jurymen are open for public inspection, when any objection in order to obtain a withdrawal from the list should be raised. There are two exceptions to this rule : the proceedings will be considered void if the juror was not a Prussian subject,

or if he was not in the full enjoyment of his civil rights. So that there is this difference between the English and the German system, that the English law establishes certain exemptions and the Prussian certain incapacities. Deafness, blindness, unsoundness of mind, want of memory and other mental or corporeal infirmities may become impediments to serve as juror. On the first instance it must be left to the discretion of the juror himself whether he feels competent to fulfil his duty, notwithstanding a defect of the above mentioned kind; if however such defect has been of such intense character that the juror has been unable to understand the proceedings, or that he himself was unable to form any opinion of his mental or physical state, for instance mental incapacity, the Court of appeal would be justified to admit evidence as to such facts and judge as to the capacity of the juror. Having considered the general capacity of a person to enable him to become a juror, we shall now look a little more closely into the practical working of the Prussian law of juries, and especially consider three points, the qualification and disqualification of the jurymen, 2, the nomination of the jurors, and the juryman in the box, and 3, the public prosecutor.

In considering the question how the jury list is made out, we must bear in mind that under the Jury Act the clerk of the peace issues annually his precept to the churchwardens and overseers of every parish to make out and return a true list of jurors, containing the name of all men qualified to serve on juries, arranged in alphabetical order, to have such lists printed and fixed on the principal door of every public place of religious worship within the parish on the three first Mondays in September, and to subjoin a notice that all objections to the list will be heard on a certain day in Petty Sessions; the churchwardens or overseer is then to attend such sessions with the original list and is bound to answer on oath any questions put to him by the justices. The list so allowed or corrected by the justices is then signed by them and taken

charge of by the clerk, who sends in each list to the Clerk of the Peace, who, attests on oath the receipt of the list, and that no alterations have been made since its receipt. The clerk of the peace is to keep the list among the records of the sessions, arranged with every hundred in alphabetical order, and every parish within such hundred likewise in alphabetical order, and cause them to be copied in a book, namely, the juror's book, and deliver the same to the sheriffs of the county, who is to return a competent number of good and lawful men from the said juror's book.

Having given here a mere outline of the mode in which the jury list is made out under the Jury Acts, the difference in the Prussian process of composing jury lists will at once be intelligible. We may observe that the whole of Prussia is politically divided into certain large districts called provinces, and that each province is again divided into smaller districts, called circles, somewhat analogous to the English counties, although the Prussian circle is considerably smaller than an English county. At the head of the civil government of each province is placed an officer called president in chief, under whom all administrative matters (that is to say, no criminal or strictly judicial matter) are managed by certain government boards, composed entirely of paid officers appointed by the king and headed by a president; each of these governing bodies comprises several minor districts called, representatives of circles, we may call them counties, at the head of the civil administration of each of these circles or counties is placed another officer (Landrath) who may be called governor of the county. This organization of the administration has been very recently modified by law, giving it a more representative character. In order better to understand public administration in Prussia, it is necessary to mention that by the laws of Prussia, a clear distinction is established between matters of law and matters of public administration. Whilst in England the administration of justice, and of public matters, as a rule, are combined in the hands of the

justices of the peace, and any public matter, as a rule, is ultimately subject to the decision of a Court of justice, in Prussia, justices with a similar power are unknown, so that for instance the Police, the Poor, Highways, Railroads, Canals, and so on, are exclusively under the control of paid government officers; the jurisdiction of Courts of Law being strictly confined to disputes in matters of law. This must be considered as a very superficial description, and only intended to make intelligible the nature of the proceedings in constructing a Prussian jury list. The governor of each county, and in a town, if not forming part of such county, the town council, or where no town council is existing, the chief of the community is to draw up an original list in alphabetical order and consecutive numbers every year in the month of September, containing the names and full description, age, and residence, of all who may be called upon to serve as juries" (Law, 3rd January, 1849, sect. 46). That original list is to be open for inspection to every one for three days, at a place publicly made known. Notice of any objection to be raised against the list must be given within these three days. If the party whose duty it was to draw up the list considers the objection well founded, the amendment is to be made within the next three days. We at once observe the important difference in the proceeding under the English Jury Act. According to the Prussian Law the very same person or body who is accused of an error, or irregularity, or wrong, is also the person or body deciding the dispute, whilst under the Jury Acts a formal decision is very properly given by the Justices of the peace, who had nothing to do with the making out of the list. These lists so made out are forwarded by the governor of the county, or the town council, or the chief of the community to the president of the governing board of the province, in whose district the same has been made out, "who settles them definitively." So we have seen the governor of the county draws up the list—not of all persons qualified—but of those persons who

may be called upon to serve at juries, not a very precise expression, made even more loose by the further proviso, that any objection raised against the list is determined by the same authority, who made up the list. That list now passes the third ordeal, that of the president of the governing board, who settles it definitively. The law is fortunately more explicit in explaining this "settling;" it provides, that out of the same (that is to say the settled list) he, the president, is to make up an annual list of those persons by him to be selected out of that district *whom he considers fit* to act as jurors for the ensuing year. We find here that a paid government officer *settles* the original list absolutely, in his discretion all persons removed by a stroke of the pen are thrown out, and no one has a right to raise the slightest objection however qualified in law. Out of this settled list the same president again, is to extract a list of persons "whom he considers fit to act as jurors," under the Law of 1849. The Government however did not consider this mode a sufficient safeguard to protect the interest of the State, and added further guarantee in a law published 1852. By this it is provided that the original lists, as made out by the governors of the County, the town council and two representatives, shall not be transmitted to the president of the government board, until the said governors of the County or "*the chiefs*" of the municipal bodies, not forming part of a county, shall have conferred with the Directors of the Court of Justice of the first instance in the central district as to the fitness of the persons inserted in the list for the performance of the duties of jurors, and shall have entered the observations made by the said judges in the list of jurors. The process of sifting does not end here. A fortnight before the commencement of the sittings of the Court of Justice the president of the Governing boards* is to make out a list of forty-eight persons from the jury list and to forward the same to the Court of Justice of the place where the trials by jury are to take place. The judge presiding at the court before which the criminal trials are to take place is to

select absolutely in his discretion thirty persons out of that list of forty eight persons, and these thirty are to act as jurors for the sittings in question; twenty four jurors must be present to form a jury list and disputes about the formation of the jury must be decided by the court (usually formed by five judges.) The names of the jurors are placed in a box and drawn by the president, the prosecutor and defendant have the right to challenge only so long as more than twelve names remain unchallenged, either party being entitled to challenge an equal number. Thus a Prussian jury is constituted. I am afraid that a court where the jurors are so carefully sifted and selected by Government officials could not in fairness be called a Court of Justice by an Englishman. If Mr. Bentham had known this "trial by jury" his observations on packed juries would have formed an important additional chapter. I venture to say that no Englishman would consider this kind of trial by jury "the grand bulwark of his liberties." But what shall we say if, besides the absolute power of purifying the jury list, the court has another general power to remove for "cogent reasons" the case before another jury. We are not enlightened what these cogent reasons are, they again are left in the absolute discretion of the Court!

No such temptation has been offered to Prussia, for the reader must recollect that all political crimes and offences are excluded even from this so called jury. It is surprising that notwithstanding such careful purgation of the jurymen, the jury did not always work in its very limited sphere to the satisfaction of the Government, and as mentioned before, an idea sprang up supported officially, to do away with that so-called jury, an idea apparently now abandoned. A new law of criminal procedure for all Germany is taken in hand, and we sincerely hope that its trial by jury is no longer to be a mockery of justice.

We are glad here to introduce a point of practice—the principle of which may usefully be adopted in the English trial by jury. The possibility was looked upon with the

utmost concern, that on the Tichborne trial, or perhaps on any trial of some importance, a juror might become disabled to attend up to the termination of the trial, and that no other way seemed to be open to get out of an enormous difficulty than to repeat the whole trial from the beginning. Against such an emergency the Prussian law gives ample protection, for it provides in that respect that a list of jurors is to be made out of such persons who are resident in its immediate neighbourhood. If, at the beginning of the sittings of the court, the lawful number of jurymen should not be present, the president may at once order the attendance of jurymen from the supplemental list, and the jurymen so summoned is bound forthwith to attend. The president of the court may also order at the commencement of the trial, before the names of the jurors are drawn that, besides the twelve jurors, one or two substitutes are drawn ; in that case, of course, the right to challenge is curtailed by the number of the substitutes. If the substitution for one of the principal jury becomes necessary, the substitute takes his place in the turn as the latter have been drawn. Such substitutes must attend during the whole trial, and occupy seats separated from the principal body of jurors. A glance at another German jury law may not be out of place. Of more recent date is a Württemberg law for the "Formation of Juries," dated 17th of April, 1868. It provides "That every Württemberg subject, thirty years of age, paying any direct State tax, is bound and entitled to serve the honorary office of a juror, if he does not belong to the persons excluded by law." As regards the making up of the list of jurors, the original list of all persons legally competent to serve is prepared in each community by its mayor or chief, with the assistance of two members of the municipal council. A commission elected annually for a district analogous to a county, is to select out of the said original list the jurors at the rate of one juror to 500 inhabitants, at the same time that commission is to designate certain supplementary jurymen. These lists are communicated to the district court of justice, whose chief

judge, with the two next puisne judges, in their discretion, strike out the fifth part of the persons in the list, so that only one jurymen remains for every 750 inhabitants. Although some elective elements are introduced in the proceedings for constructing a Württemberg jury list, still it manifestly does not approach in the slightest degree the perfectly independent English jurors book. The Württemberg law likewise admits supplementary jurors and substitutes; the court, before the commencement of the sitting may order a certain number of supplementary jurors to be drawn, and, before the beginning of any trial, it may order substitutes to be drawn, who are to attend the whole trial, and to take the place of a principal juror, if necessity should require it.

We shall now briefly consider the working of a Prussian jury. The formation of the court and jury is to be effected for each cause on the day on which the same is to be tried in a public sitting when the President of the Court, the Clerk of the Court, and the Public Prosecutor, or his substitute, must be present. If several cases are put down for trial on the same day, the jury first sworn may dispose of the following causes if neither the Public Prosecutor nor the defendant raise any objection.

The names of the jury are called out in the presence of the defendant, who may have the assistance of counsel; each name of a juror, if answered by him, is then placed by the clerk of the Court in a box, from which the names are drawn. The drawing of the names out of the box is done by the President. As soon as a name is drawn the prosecutor is first to declare either "accepted" or "declined," and afterwards the defendant or his counsel, thereby signifying the acceptance or challenge; no reason for the challenge need be stated, and revocation of a challenge is inadmissible as soon as the next name is drawn. At the moment where twelve jurors not challenged have been drawn, the Court is properly constituted; the twelve jurors are indispensable, otherwise the proceedings would be null and void; which would also be the case if a person should act attainted with

an impediment which would prevent a judge from acting, or if a witness, or interpreter, or expert, or police officer who had been engaged in the matter should act as juror. The President tenders the following oath to the jurors before the commencement of the proceedings:—"You swear and promise to God the Almighty and Omniscient, in the prosecution against N., firmly to fulfil the duties of a juror and to give your vote according to your best knowledge, and conscientiously, no one to favour, or to harm, as becomes to an independent and honest man, faithfully and without deceit." The jurors make this oath by lifting the right hand, and saying, "I swear it so help me God." Members of religious communities who are legally permitted to use another form than the above oath, may use such other mode of confirmation.

If a juror not duly sworn has taken part in the proceedings they would be null and void. The Clerk of the Court reads aloud the indictment, which should give a full statement of the facts, and point out the law under which the facts charged are punishable. We touch here upon a point of most vital difference between the English and Prussian law. The Prussian law does not know the system of a grand jury, and in fact there is no other nation than England who may boast of such a great bulwark of liberty. It is absolutely unintelligible at least to a foreigner how a single voice could be raised for throwing over the main pillar of the British constitution, for destroying the noblest landmark of liberty. If we happily live in a time when political strife is at rest, should that be a reason to raze the stronghold of freedom? And if there is some personal inconvenience in the exercise and fulfilment of the duty inherent to this sacred office, surely such mere external circumstance cannot in the least affect a right of the highest intrinsic value. Let the impediments to a fair exercise of such noble duty be carefully examined, and with a little determination the apparent burden will be reduced to a very minimum.

According to the Prussian law, a formal committal is not requisite in all cases, if formally pronounced, it is done by the judge, and until committal is pronounced the defendant is not at liberty to employ counsel for his defence, while, on the other hand, in these preliminary inquiries as well as in the proceedings before the Court the Public Prosecutor is entitled to apply to the Court, a procedure materially different from English proceedings, where the defendant is fairly heard by the justice of the peace or magistrate before any committal. In the proceedings before a jury the President questions the defendant whether he admits to be guilty or not, if he admits himself to be guilty and at the same time admits the material facts of the case, then the public prosecutor and the counsel for defendant are heard whether they consider the question of fact to be sufficiently established by the confession of the defendant. If the public prosecutor should desire it, additional questions qualifying the criminal act, are to be put to the defendant, if not admitted by the defendant, they are to be submitted to the jury. If no such questions are proposed, or if the defendant answers in the affirmative, then the Court may proceed to judgment without the jury, provided always that the Court does not entertain any doubt as to the correctness of the confession, the power given to the Court in that respect not being restricted. Before the Court proceeds to judgment it is to hear the public prosecutor as well as the Counsel for the Defendant on the application of the law.

The admission of the defendant is not a mere admission of the circumstances of the case, he must confess clearly his guilt, and the act itself as well as his personal authorship, so that the verdict of the jury is fully established by the confession of the defendant.

At the instance of the defendant or of the public prosecutor questions may be raised as to facts which in their consequences would do away with any punishment, or which would justify a reduction of the lawful punishment; or if the law should admit extenuating circumstances, or if it is to be ascer-

tained whether the defendant acted with sound understanding, no proceedings before the jury are to take place, if the public prosecutor in his deliverance on these facts expresses himself in favour of the defendant, provided always that the court in its discretion has no doubt in adopting the view favourable to the defendant. It is, therefore, generally in the absolute discretion of the court whether the admission of the defendant is sufficient to withdraw the same from the jury, and if the court entertains any doubt as to the sufficiency of the admission the evidence is to be proceeded with as if no admission whatever had been made. (Sect. 75.)

The presiding judge has the conduct of the proceedings, and here we meet with a point altogether opposed to the principles of English criminal proceedings. Whilst in England any defendant is legally warned to abstain from any statement as it would be taken down and used against him, the Prussian mode of criminal procedure (sect. 76, Law dd. 3rd May 1852) imposes upon the presiding judge the duty of examining the defendant upon the facts of the case. The defendant is "expected" to answer, but he is not upon his oath, and it is of course left to the discretion of the jury what value they will attach to the declarations of the defendant. The defendant is not bound to answer at all, the law specially providing (sect. 13 Law dd. 3 January 1849) that no defendant should in any wise be forced to answer. As a matter of fact it may be mentioned that generally the defendants enter into the full details of the case, the common criminal of course embellishing his deeds by any lies meant for the purpose, and it is of frequent occurrence that the guilt of the accused is more inferred from his palpable lies than from other circumstances of the case. We believe that it would be a great benefit for an innocent defendant if he were at liberty to give *at any moment* his version before the court. It is true that silence may lead to dangerous misconstruction; if, for instance, the defendant declines to speak because otherwise a person dear to him would be implicated, or because he hesitates from honourable motives to play the

part of an informer. Such cases we believe form an exception, and will not afford reason for depriving an innocent party of his natural right to make a statement. On the other hand, it cannot be denied that there have been judges who considered it their duty to convert the examination of the defendant into a mental torture and to press for an admission; and here, of course, we get on very slippery ground, especially if we bear in mind that the jurors are selected by the president. An independent jury would easily discern a fair examination, and an inquisitorial racking. It is to be noted that the Prussian courts have held that the defendant should be at liberty to make his statement after the examination of each witness. It will not be easily understood by an English lawyer that the presiding judge also conducts the examination of witnesses. Whoever has seen the proceedings in an English Court of Justice cannot but admire the dignity maintained by the judge, supported by the bar and revered by the public; that dignity is in our view lost immediately if the judge undertakes to examine witnesses. How is it possible to imagine an examination of witnesses without supposing a certain state of facts, be it guilt or innocence, and who is to suggest the facts for investigation to the judge? and how unbecoming would be the scene if a judge was forced to *twist* a reluctant witness, or to receive offensive answers? This examination of the witness is a clear remnant of the old inquisitorial system where it was the glory of the inquisition not to find the prisoner guilty, but to *make* him guilty. Unfortunately, the great mass of Prussian lawyers have been brought up in this system, and, never having seen anything better, many of them believe in the extinction of law and justice if that mischievous right of examining witnesses should be withdrawn from the judge. Whoever has seen an English trial, and had the opportunity to compare the same with the sight of a Prussian judge's examination, cannot hesitate for a moment to say where the sanctity of the law is acknowledged and really protected. The Prussian

judge is bound to allow the public prosecutor directly to put any question to the defendant as well as the witnesses, but it is left in his discretion whether he *will* allow the defendant or his counsel or the jurymen to put direct questions which they may consider apt for the elucidation of the facts of the case. It is only in cases where the public prosecutor and counsel for the defence consent, that the judge may leave to them the examination of the defendant, and the witnesses of the opposite party then has the right of cross-examination. The judge is at any moment entitled to resume his power to put questions directly, and he is at any time at liberty to declare the investigation closed, a very dangerous, if not arbitrary, power, for a judge of a tribunal constructed as we have shown.

The clerk of the court has to keep an official minute of the proceedings ; the questions put to the jury must be inserted in the minute, together with the answers of the jury. After the evidence has been taken the public prosecutor gives his exposition and arguments, and counsel for the defence has the last word in any case. The presiding judge then sums up and puts the questions to the jury. The questions are to be put in such form that they could be simply answered by yes or no, and the jury is at liberty to answer any question partly by yes partly or by no, the main question not to be divided into several questions. Circumstances excluding, decreasing or increasing any punishment are either to be specially mentioned in the main question, or to be put in distinct questions. The questions are to contain all facts which form the material features of the crime imputed to the defendant, otherwise the proceedings would be null and void. Among the facts to be submitted to the decision of the jury are the soundness of mind, the intent, or the negligence, on the existence of which the idea of a punishable act is dependent. The main question is to commence with the words—is the defendant guilty ?

In describing the material features of the offence all technical terms are to be avoided which have not a well known

meaning applicable to the case. The presiding judge is to hand the written questions signed by him to the jury, and at the same time orders the removal of the prisoner to the out room. The jury retire to their room, and there elect a foreman by a majority of votes. He has the conduct of the deliberation, and to announce the result. The jury must not leave their room before they have resolved upon their verdict, nor can any one have access to them. After consultation the votes are given on all the questions in the order in which they have been put. The foreman is to ask singly every jurymen for his vote, in such turn as the names of the jurymen have been drawn by lot, the foreman giving his vote last ; if any question has been partly answered in the affirmative, the remaining part of the question is to begin with the word, " Yes, but it has not been proved that." If the question as to the main fact has been negatived, all incidental questions are to be considered disposed of thereby. In the contrary case all incidental questions must be put and answered separately, any answer unfavourable to the defendant may be voted only by a majority of votes ; if the number of votes is equal, the meaning favourable to the defendant is to prevail. In every verdict by which a question is answered against the defendant, it must be expressly stated whether the same has been given by a majority of more than seven votes, or only by seven votes against five, under pain of nullity. In any other case the number of votes is not to be stated. If an answer unfavourable to the defendant has been given only by seven votes against five, the Court, usually formed of five judges, is to deliberate on the point and to give the decision on the same without stating any reason for such decision.

The law further directs that every juror must form his opinion as to any question submitted to him by a careful examination of the evidence produced for the prosecution, and for the defence, according to his free conscientious conviction, won from the whole of the proceedings before him. Before the commencement of the deliberation on their ver-

dict, the foreman is bound to read to the jury the following admonition —

“The law does not require from the jury any declaration as to the reasons of their conviction, and prescribes no rules by which they are bound to judge about the effect and the fulness of the evidence. It, however, imposes upon them, under a solemn oath, the sacred duty to examine carefully and conscientiously all proofs produced for or against the defendant, and to give their votes only after their deep conviction won by such examination. Their deliberation and their answers must be restricted to the questions submitted to them. Their view as to the justness or propriety of the penal law is not to influence their verdict. Not they, but the judges are called upon to pronounce the consequences of the law, which befall the defendant for his acts. The jurors have therefore to give their verdict without regard to the legal consequence of the same.”

This admonition and the principal sections touching the position of the jury, are to be placed in print in several copies in the room where they retire for deliberation.

It has been considered inadmissible to state that the verdict was given unanimously. In case any doubts should arise in the minds of the jury as to the manner of proceeding or as to the meaning of the question proposed to them, or as to the framing of the answer, they are at liberty to apply to the presiding judge for information, and such information is to be given to them in the presence of the other members of the court. How little the true nature of the position of the jury has been understood, even by judges, appears from a decision given in the case of Kutsch, in 1859, where it was held that, if the presiding judge should come to the conclusion that a further explanation may be advisable to be given to the jury, he would be justified to enter their room without being called upon to do so by them. This view has been held decidedly wrong, and as the presiding judge is bound to give any explanation, if called upon in the presence of the other members of the court, it follows that he is not at liberty

to enter the room where the jury is deliberating. As such an explanation is only to touch formal points, and not the merits of the case, it never can affect a resolution already come to by the jury. After the jury has, in the manner aforesaid (even by a simple majority), resolved upon their verdict, the same is to be reduced in writing, and such writing is to be signed by the foreman. Upon the jury coming into court the presiding judge asks them as to the result of their deliberation ; the foreman of the jury rises and answers—"Upon my honour and my conscience before God and man, I testify the verdict of the jury is"—he then proceeds to read the questions put to the jury and the answers given by the jury. The answers so given are handed to the presiding judge and have to be signed by him and the clerk of the court. It has been held that the jury is not entitled to make any alterations in the questions, and although the answers may be signed by the foreman, they are not considered as final so long as they have not been read, and may be changed if made erroneously or even corrected, if a fresh voting should have taken place and a different verdict be the result. Even if in reading the answer only one jurymen should raise any doubt as to the correctness of the answer as written down, the presiding judge would be bound to send the jury back to their room for redeliberation and removal of, or correction of, any such doubt, and to frame the correct answer or verdict. It has even been held that after the verdict has been read and signed by the judge and clerk of the court, a reconsideration would be admissible in certain cases ; for instance, if when doubts are raised by the jury that the answer was not complete or not intelligible, or if the jury should declare that they had not understood the proper meaning of the question. If, however, the Court has pronounced judgment, an alteration of the verdict would be clearly inadmissible. In deviation of the English practice the jury is not at liberty to deliberate in Court, they must retire to their room to consider their verdict. We cannot discover any cogent reason for such practice. Why should the jury not be competent

to judge for themselves, whether there is occasion to retire? Why should they retire in perhaps the clearest possible case? If the Court should find that the verdict is not regular in form, or that it is unintelligible or incomplete or contradictory, the jury may be directed to retire to their room in order to set matters right; the Court may order this in its discretion, or at the request of the Public Prosecutor, or the counsel for the defendant, and this may be done at any time so long as the judgment of the Court has not yet been pronounced on the ground of the verdict. If any amendment of a verdict is made, it must be done in such manner that the original tenor of the verdict could still be read. —It has been held that the jury or the foreman cannot give any verbal explanation of a verdict. It is a singularity of the proceedings that if the defendant is not present when the answer or verdict of the jury is read by the foreman, the defendant is brought back to the Court only after the verdict has been read by the foreman and signed by the judge and clerk, and in case the court has to pronounce upon the verdict—then follows the decision.

If the judges should unanimously be of opinion that the jury have made a mistake in the matter to the prejudice of the defendant, although the verdict might be quite correct in form, the Court is to refer the cause to the next sittings, so that the same may be adjudged by a fresh jury in which no jurymen are to take part who were engaged at the first trial. The Court is not to state any reasons for such a decision, and has to pronounce its resolution to that effect, before the reading of the verdict has taken place by the Clerk of the Court. Neither party is at liberty to apply to the Court for such a determination; it is a proceeding absolutely in the discretion of the Court. If the second jury should confirm the verdict of the first jury, the Court is bound to pronounce judgment upon such verdict. In case that a verdict of not guilty has been brought in by the jury, the Court has to pronounce a judgment of acquittal, and to direct that the defendant be set at liberty provided that he is

not imprisoned for another reason. If by the verdict of the jury, the defendant has been declared guilty, the public prosecutor is to move the Court for the application of the law, and will then enter into an explanation as to any question of the law, and as to the mode of punishment. He has, however, no right to criticise the verdict of the jury. The presiding judge thereupon asks the defendant whether he has anything to urge in his defence. Defendants are not at liberty to discuss the facts as established by the verdict of the jury; their arguments must be restricted to the legal consequences of the verdict. The public prosecutor may reply. In any case, however, the defendant has the last reply, and here we may again observe upon another great point of difference between the English and German criminal procedure. It is a well-known rule in English proceedings that where the defendant has produced evidence, counsel for the prosecution is entitled to reply, that is to say he has the last address; and this principle has even been extended to the case where the defendant had given evidence only as to character, although in practice such right is rarely exercised. Now generally speaking the mouth of the prisoner is never closed for mere technical reasons in a trial under the Prussian form of criminal procedure. The pleadings of the prosecutor and defendant with reference to the questions of fact are not restricted; the prosecutor may reply as often as he considers it necessary; the defendant, however, is always entitled to the last word. The prisoner may, as it has been observed before, interpose after the examination of each witness, if he has to say anything for an elucidation of the facts, and, the more important the crime of which the prisoner is accused, the greater latitude is permitted to him to give explanations, and it is the understood right of the defendant to have the last word before the jury and the Court, even in a discussion on a single point. So extensive is this right of the defendant that after his counsel has made his last address to the jury, the defendant is perfectly at

liberty personally to address the jury. This rule is not peculiar to the present proceedings of criminal procedure; it was always recognised as an inherent right of the accused to tender either himself or by his counsel a written memorial to the Court for his exculpation, as the concluding part of the proceedings. We believe that in the case of Müller, his compatriots were not fully aware of the dangerous consequences of depriving counsel for the defence of the last word by insisting on producing evidence for Müller, which did not turn out conclusive. We have been unable to discover any cogent reason why the defendant should be deprived of the last word in any case; on the contrary, it seems repugnant to justice that the jury should proceed to deliberation having the views taken by the prosecution last impressed upon their minds, when the sacred task of justice is to ascertain guilt or innocence. Although it should not be so, still it will be and is the fact that the prosecution will be inclined to draw all inferences in support of guilt. Let the prosecution have full sway to establish the guilt of a prisoner, but do not deprive him of the opportunity to place his views and his conclusions in a last answer before the jury. No one can doubt that the defendant is personally more interested in the issue than the prosecutor. We cannot leave this point without stating our strong impression that the restriction imposed upon the defendant by the above rule is altogether contrary to the true spirit of the British character.

After the public prosecutor and the defendant or his counsel shall have finally addressed the jury, the presiding judge has to sum up the whole case, to explain the laws if there could be doubt as to their application to the facts, and generally to make such observations which, in his discretion, may appear to him proper for obtaining the pertinent verdict. This address must not be interrupted, neither by the public prosecutor nor by the defendant or his counsel, nor would it be made the object of any observation or of any application in these sittings. Having finished his address

the judge is then to put the questions to the jury, such questions may be altered or increased until the verdict is given to save all formalities. When the law here in question was the subject of deliberation in the Prussian Legislative Chamber it was proposed that the judge should be at liberty to offer his opinion on the weight of the evidence given. That proposition was negatived, so that the judge is strictly confined to a plain statement of the facts and of the evidence given, explaining the bearing of the law wherever necessary. Nevertheless, it has been held that under particular circumstances the public prosecutor or counsel for the defence may, after the summing up of the judge, be permitted to address the court on special points of fact, without, however, referring to such summing up of the judge.

The public prosecutor and the defendant having addressed the court upon the effect of the verdict, the judges retire to their room for deliberation, no other person being permitted to be present. The judgment is passed by a simple majority of votes. If the act of which the defendant has been found guilty is not declared punishable by any law, the court is to pronounce an acquittal; for the jury may have declared the defendant guilty of an act, which in law would not constitute a crime. An acquittal of course must be pronounced in case there should be other circumstances excluding punishment, for instance if the prosecution was barred by lapse of time and the defendant may raise such plea at any time before the judgment. He will never be barred in his defence by any technical objections provided he raises such objections before judgment is passed. If the plea is concerning a matter of law, for instance of limitation, the court is bound to notice it without pleading as matter of course.

The clerk of the court is to draw up a minute which is to contain the names of the judges, of the clerk of the Court, of the jurors, and of the acting public prosecutor, of the defendant, of his counsel, of the witnesses and experts, of the allegations of the prosecution, and

of the defendant. Of the evidence of the witnesses and the experts only, the material parts are entered on these minutes. If there have been any depositions previously made it is only to be noted in the minutes whether and what deviating statements have been made. Any applications made by the prosecution or by the defence on which any division of the Court has been given are to be entered on the minutes, or the same must be annexed to the minutes or exhibits; the same course is to be followed with regard to the questions to, and the answer given by, the jury. If the judgment is drawn up separately its directory part is to always be entered on the minutes. The minute is to be signed by the judge and the clerk of the Court. The evidence as to the due performance of all legal formalities can be furnished only by these minutes.

There is no doubt that the so called Prussian jury is some thing widely different from the English jury, without a previous examination and decision of a grand jury, the so-called jury is a set of gentlemen carefully picked by government officers, who by a majority of eight out of twelve have to give their verdict on a very limited number of crimes, there being expressly excluded all political crimes and all offences committed by the public press. This verdict again is to touch solely questions of fact, which of course it is frequently impossible to separate from the law in an interrogatory upon guilt. This very narrow field of jury trial is further restricted by the provision that at the instance of the public prosecutor (not of the defendant) for "important reasons" the case may be transferred to another court. What these important reasons are the Law does not define. A clear deviation from a well understood principle that no one shall be withdrawn from his proper judge.

A new Law for regulating criminal procedure throughout Germany in a uniform code is in preparation, and we hope soon to be able to report more satisfactorily.

V.—THE ENTAIL AND TRANSFER OF LAND.

SIR WILLIAM HARCOURT lately made an able speech in the company of a Cabinet Minister (Mr. Cardwell) which it was truly thought might be taken as indicative of the views of the Ministry on the important subject of the laws relating to land, especially its entail and its transfer. And there can be no doubt that, especially coupled with Mr. Gladstone's election address, which mentioned the land laws as the subject of proposed legislation, the speech of Sir W. Harcourt had a great effect at the recent election. The general scope of his remarks was thus very fairly stated by the *Times* :—

“Sir William Harcourt justly pointed out that the so-called abolition of the Law of Primogeniture would not materially affect the tenure of land. It is merely a law that if a man dies intestate his real property, instead of being divided, like his personal property, among his heirs, should pass to his eldest son. It was an important law in the days when wills were rare, but in these days its first result would be to render land owners more careful to make their wills. The question of entail and settlement is much more thorny. Mr. Harcourt expresses a conviction that the existing law of Entail has a mischievous effect in preventing expenditure of capital on the land. He quotes a remarkable statement, just made in a report of a Committee of the House of Lords, that only one-fifth of the land of England is at present duly cultivated. This is no doubt, an admission of great gravity from such a source, and will stimulate the feeling now awakened on the subject, and if it can be made out that the Law of Entail is really in any considerable degree responsible for such a failure, a strong case would be made out for its modification. Sir William Harcourt, however, is moderate in his suggestions, and they need not alarm the friends of the existing system. He seems to think entail can be relaxed without being abolished, and that even its abolition need not involve the loss of the power of settlement.”

But Sir William Harcourt's opinions, expressed, too, in the presence of a Cabinet Minister, were far too important not to have had very great influence, and are, therefore, deserv-

ing of notice. First, as to primogeniture, what he said was this :—

“To alter it would neither effect such changes as some fear, nor would it operate at all to the extent which some hope. I don't know that any one wishes to prevent any man from disposing of his own property at his death as he pleases. The right to do this is one of the greatest stimulants to industry and prudence—things in which society is deeply interested. What I desire is to make the right still more absolute than it already is. But when a man is unwise enough to die intestate, the law, in the case of his goods, makes for him such a will as a just and fair man might be expected to make. In the case of land, on the contrary, the law makes a will which no conscientious man in his sound mind would make. It accumulates on one child the whole of the estate, without regard to the interests of those for whom any good man would feel bound to provide. Surely, to reform such a state of the law would be a just and a wise policy? It need not lean to sub-division, for in the case of small properties the estate might be sold for the benefit of all.”

No doubt in favour of this view it may be said that the tendency of modern legislation and modern law is to treat land as far as possible like money; as, for instance, with reference to claims of creditors (3 & 4 William IV. c. 104). And, further, it should not be forgotten that originally landed property, like personalty, was divided among all the children, and for many ages no wills of land were allowed at all, so that the family could not be disinherited, and shared equally, though it should also be borne in mind that in those ages estates were large and population was small. But there is this distinction between realty and personalty, that personalty admits of indefinite division, whereas a small estate, and especially a *residential* estate, is such as most moderate estates are—is not divisible, and is destroyed by division. The proposal to meet this strong objection is that in cases of intestacy the estate shall be sold: but it should be left open to the eldest son or any other member of the family to preserve the estate, charging it with portions for the other children, equal to their shares of the money value.

Then as to the transfer of land, Sir W. Harcourt said, that it

was intricate and costly, but he did not point out the causes nor make any practical suggestion for a remedy. He alluded, indeed, to the attornies, who at present depend on a bad principle, and perhaps an alteration of their mode of remuneration which is now proposed, might mitigate the evil. But it is surprising it does not occur to those who discuss the question of transfer, that the difficulty is as to the examination of title; and that the difficulty increases with every devolution of title, and, therefore must *augment as transfers become more numerous*. The more, therefore, the division and transfer of land is facilitated, the more must the difficulties as to title increase. This is inevitable unless something can be done by way of registry of title or otherwise to reduce the difficulty as to title. There is the root of the difficulty—not transfer but title. An estate may be transferred by half-a-dozen lines on a piece of paper containing no more than its stamp and a trifling fee to the attorney, supposing the title is clear. But sixty years' peaceful possession is supposed necessary to give a clear title, dispensing with any examination of deeds, and such a possession will become, of course, more and more rare as division and devolution of land become more frequent. And even supposing a man to start clear to-day with a simple absolute indefeasible title, in a few years by devolution and division of the land through deaths, mortgages, and other events or transactions difficulties as to title may be created. None of those who talk about simplifying the transfer of land appear to be aware of the real source of the evil they desire to remedy. But, as Sir W. Harcourt truly said, "these though are only the fringes of a great question; there remains behind a far more important topic." And what is that? Sir W. Harcourt says it is as to the effect of settlement and entails which he said hinders the application of capital to the land. It is not feudalism he said, but only entails, which were known long before feudalism existed. Feudalism, he said, does not affect our land laws, whereas, on the contrary, it pervades the whole law of landlord and tenant. But Sir W. Harcourt, in

dealing with the subject, did not advert to the nature of the law as to the relations between landlord and tenant, under which, unless by stipulation in an elaborate lease, certain to contain onerous covenants, or except by virtue of some special local custom, the landlord not only reaps all the benefit of unexchanged improvements by the tenants, and can either actually either raise the rent on account of those very improvements, or force him to go, leaving them in the soil, and enabling the landlord to exact an increased rent from the incoming tenant. The gross injustice of this law has already caused it to be altered in Ireland, and the pretences under which it is allowed to remain in Ireland are obviously sophistical. It is equally obvious that this state of the law must be the real proximate cause of any deficiency in the application of capital to the cultivation of the soil, for the simple reason that the cultivation is in the hands of the tenants, and the tenants do most of the improvements. Yet on this subject Sir W. Harcourt had nothing to say, and he ascribed the whole evil to the Law of Entail and settlements, which, at the utmost, can only affect the landlords, who, for the most part, have nothing to do with the cultivation of the land. He appeals to the report of the Lords Committee on the subject—a committee of landlords, it will be observed—and he insisted that the whole mischief lay in entails, and that limited owners would not lay out money in farm buildings and other improvements as owners in fee simple would. But if the land is let to a good tenant with adequate capital, and he is certain of getting the benefit of it, he will erect the buildings and do the drains. Why does he not do it? Because the landlord may rob him of the benefit of his outlay, raise his rent, or turn him out; a state of law grossly iniquitous, and as opposed to legal principle as to moral justice. Sir W. Harcourt, however, was blind to all this, and would speak of nothing but entails and settlements which, he said, prevented tenants for life from laying out money on the improvements of estates. We believe, however, that recent statutes give tenants for life.

powers of leasing, and might give power of charging for permanent improvements. Sir W. Harcourt, however, was for prohibiting entails of land, and giving power to charge for children. You may charge, he said, without entailing: no doubt, and so the entailed estates are charged for the benefit of younger children. But the answer to all this is that, in most cases, those who cultivate their own land are absolute owners, and that as to the rest it is almost entirely in tenancy, and that if the tenants had due security they would find capital. Sir W. Harcourt no doubt states with great force and eloquence the case against entails, but might not all his objections be obviated by allowing more facility for barring an entail? He expatiated on the evils arising from great expectations, but are there not, on the other hand, great advantages, and do not the advantages generally preponderate? Are not men who are expected to succeed to great estates generally brought up so as to deal well with them? And are we to legislate for extreme and exceptional cases of vice or folly? It would be impossible to state the arguments against entails with more eloquence and with more force. These arguments, however, it will be observed, apply rather to the families themselves, and not the farmers, their tenants, and we still think that with reference to the cultivation of land, and the welfare of the community at large, the law of landlord and tenant is of far greater practical importance than the law of entail. And we also think that even as regards the arguments so powerfully urged by Sir William Harcourt, they may be met and answered in a very simple way by legislative modification of entails, as for instance, by enabling a tenant in tail not to alienate but to transmit to a younger son, perhaps with the sanction of the Court of Chancery.

We are bound to state that in his paper on the Transfer of Land, read before the Law Amendment Society, in 1871, the late Mr. Jacob Waley made six suggestions: (1) To shorten the time allowed by law for the assertion of dormant claims to five years, with the addition of ten years in cases of infancy and absence. (2) That adverse possession should

operate against the estate—that is to say, not merely against the limited owner, during the currency of whose interest the adverse possession takes place, but against the whole series of owners having successive interests, who for this purpose should be considered as represented by the owner entitled to the possession and barred by the non-assertion of his rights.

(3) To require as a condition of the validity of settlements of lands against a subsequent purchaser, that the settlement should be enrolled at the Common Pleas. (4) That the protection given to estates tail should be abolished, and that they should exist only for the purpose of defining and limiting the devolution of land so long as not disposed of by the act of the tenant in tail, and that the tenant in tail, whether in possession or reversion, should have in all cases the full power of disposing (subject to prior interests) of the fee simple. (5) To enable the personal representative in all cases to sell or mortgage real estate of the deceased, and to recover the money. (6) That a power of leasing, as extensive as the Court of Chancery can exercise under the Settled Estates Act, should be exercisable, as a matter of course, and without the intervention of the court by a limited owner in possession. As regards a sale, he said, it may be reasonable that the limited owner in possession should be required to make an *ex parte* application to the Court of Chancery for leave to sell, and as he could not be allowed to receive the purchase money, he might, on the same application, obtain the appointment of trustees to receive the money and hold it upon trusts corresponding to the interests in the land.

The great eminence of Mr. Waley, a real property lawyer, is well known, and the opinions of such a man on the subject have a high authority. They have more interest on account of the measure just introduced by Lord Cairns, with reference to the title and transfer of land.

LEGAL TOPICS.

THE IRISH LAW APPOINTMENTS.—The changes consequent on the formation of a new Government are extensive already, yet they are not completed, for reasons which are easy of apprehension. Lord Chancellor O'Hagan withdraws into private life, on a handsome retiring allowance; and as he is in vigorous middle-life, and is a courteous and unassuming judge, of industrious ways, and much experienced in various kinds of judicial work, it is to be hoped, that under some new arrangement, connected with the Judicature Bill, the public may for many years to come derive benefit from his continued public services. Lord O'Hagan has hardly been fortunate in his more recent years of judicial life, for there have been (as all the world knows) serious and frequent differences of opinion between him and that most acute and perfect master of equity, Lord Justice Christian; and it must have occurred to many minds that Lord O'Hagan was, on the whole, more happy as a puisne judge of the Common Pleas than in the higher court, with whose system he was unacquainted, and where his colleague in the Appeals cared not to disguise the consciousness of higher legal authority and of superior power. There is now no Chancellor of Ireland, for Dr. Ball, the fluent and able M.P. for Dublin University, the first Conservative of the Irish bar, renders to the new Government services which absolutely no other man can render. For this session, at least, Dr. Ball must, at all hazards, continue to serve in Parliament. The Great Seal is, therefore, temporarily entrusted to the following Commissioners:—Sir J. Napier, Mr. Justice Lawson,—formerly Mr. Gladstone's Irish Attorney-General—and Mr. Brooke, Master in Chancery. The post of Solicitor-General being declined by the Hon. D. Plunket, Q.C., who has virtually left the legal profession, and prefers a political appointment, was with difficulty filled up. All the claimants had small pretensions, had rendered small

services to the party, and held a secondary place at the bar. After long delays, the post was awarded, it is presumed, on the principle of seniority, to Mr. Henry Ormsby, Q.C., whose name will be new to readers. It is singular to find so few and undistinguished lawyers in Parliament; and most of those who essayed to enter the door of St. Stephen's were defeated. Mr. George May, Q.C., who graduated at Oxford, and has a large equity practice, after being rejected by the electors at Carrickfergus, has been solaced by the appointment of Castle Adviser, a post which is generally valued as leading up to the superior law appointments in Ireland. These arrangements are, as before remarked, of a temporary character. In the autumn Dr. Ball may be expected to receive the Great Seal, and the vacancy so to arise in the representation of the University, if it should chance to be filled up by the election of a practising lawyer, will, almost as of course, indicate the successful man as the proximate law-officer of the Crown. Immediately before Mr. Gladstone's resignation he appointed—to the surprise of the profession—Mr. Christopher Palles, Q.C. (his Irish Attorney-General) to the exalted post of Chief Baron, vacant through the recent death of the venerable Chief Baron Pigot. The other vacant Irish judgeship (that in the Estates Court) has not been filled up; and it is supposed that it will remain unfilled until abolition or reconstruction is finally weighed and resolved on—at least, until some enquiries are made, preliminary to a re-distribution of the great legal offices under that Irish Judicature Bill, which Dr. Ball is understood to be busily engaged in preparing. Six months hence, therefore, there may be several alterations of greater or lesser moment, and affecting several departments, to chronicle in the legal system of Ireland.

JUDICIAL INADEQUACY.—We extract the following from a paper read by Mr. F. H. Janson, President of the Incorporated Law Society, before the Statistical Society on “Some statistics of the Courts of Justice and of legal procedure in England:”—

“The true test of the adequacy of the judicial staff (assum-

ing that its powers are exercised to the best advantage) is the expedition with which the business of the Courts is conducted and brought to a conclusion. The object of the suitor is to get his case, whatever it may be, ended; and the true interest of the practitioner lies in the same direction. That expedition is important to the suitor no one will deny. There is a common impression that the practitioner benefits by the law's delay, but nothing can be more erroneous. The delays arising from the periods of time which, according to the present system of procedure, must elapse between certain stages of the proceedings in all the Courts, and the delays which arise, especially in the Court of Chancery, from the difficulty of getting business proceeded with continuously before the subordinate judges or chief clerks, is extremely prejudicial to the attorney or solicitor. He has to keep the subject-matter more or less simmering in his mind (which new business would more profitably occupy) for an unnecessary length of time, and to look up the facts and figures afresh each time he has to attend before the officers upon it; and, as he has to bear all the outlay for fees to counsel, court fees, as well as his office expenses, the delays referred to involve a very serious loss in the interest of money, which the few additional attendances engendered by the delay do not at all compensate for. One consequence is, that the work is not so well done, and that there is an increase of cost to the suitor without corresponding benefit to the practitioner, so that all parties suffer. A considerable time necessarily elapses in bringing a case to a hearing; the pleadings, or in other words, the statements on either side by which the exact issues to be dealt with by the Judge are ascertained, have to be settled, witnesses examined, interrogatories exhibited and answered; and in those cases in which the evidence is to be adduced in writing, this has to be taken and reduced into proper form. But when all this is done, and the cause, being ripe for decision, is set down for hearing, the suitors have not unfrequently to wait six or nine months before it is reached, and if the briefs have been delivered, additional fees, called refreshers, are in some cases paid to the counsel for each term that elapses after the briefs were received by them. In Chancery there is, in a large majority of cases after the first hearing, a reference to the Chief Clerk to make inquiries or take accounts, the results of such inquiries or account takings being embodied in a report, on the conclusion of which the case is again set down for what is called "Further Consideration," the Decree made on which is the final and really important one. From the limited number of the chief clerks, and the multiplicity of matters referred to them, great delays are often experienced

in obtaining appointments to proceed ; and a fixed time only being allowed for proceeding on each summons, the case, if it is found to occupy (as it often does) more than the allotted period of time, is adjourned to another day, often at an interval of some weeks. I recollect a case in which I was engaged, one in which expedition was important, where the chief clerk, eminent in his class for industry and capability, was unable to give successive appointments at intervals of less than two months. Similar delays not unfrequently occur in the offices of the taxing Masters of the Court of Chancery, who appear always to be overweighted. The delays in this office often stop the progress of an entire Cause. Whatever the importance of the case to the parties concerned, and however trivial the question of costs may be, the course of the Court is to have all bills of costs which are to be paid by its direction submitted to a Taxing Master (who has no previous knowledge of the business, and sits in a very different locality to the other chancery officials), and generally to have the taxation complete before the final order or decree is made. In a letter which appeared in the *Times* of 26th January from a firm of solicitors, it was stated that on the 15th July last they applied at the office of one of the Taxing Masters in Chancery for an appointment to tax some bills of costs in a suit, but were told the office was quite full, and that there was no chance of obtaining an appointment before the long vacation, which turned out to be the case. On the 3rd of November they again applied, and obtained an appointment for the 3rd December, being the earliest day that could be named, the arrears left at the closing of the office for the long vacation having been so large. They add that a considerable loss was occasioned to their clients by this delay ; that the Taxing Masters, as well as *all* the departments of the Court of Chancery, are underhanded, and that, in their opinion, its business would be largely increased if facilities were given for its transaction in a reasonable time. Some profane and shortsighted persons would perhaps say that such increase would not be an unmixed advantage to the community ; but it is clear that those who need the aid of the Court ought to be able to obtain it promptly, and not find it choked with the business of other people. I ought not to omit to mention that the apparent expedition with which some Judges of the Court of Chancery have got through the business of their courts is attributable to the practice of throwing upon the Chief Clerks important duties which they were not originally intended to perform. It has often been argued that an addition to the number of Judges of this Court would enable them to work out in chambers

their own decrees, while the facts and circumstances were fresh in their minds, leaving the Chief Clerks to dispose of the administrative business, which is now too often kept waiting for the consideration and discussion of important questions of principle that would be more properly dealt with by the Judges. Another great want is that of readier access to the Judge. If there were the same facility of appeal from the Chief Clerk to the Judge as there is, from a solicitor's clerk to his principal, as there easily might be if a Judge sat in chambers three days in each week, much valuable time would be saved. In my own opinion the real cause of the delays in the administration of justice arise from, 1st, the want of a sufficient judicial force especially in the Court of Chancery; and, 2nd, the occurrence of what is technically called Vacations. If there was more Chancery Judges, they might get through in chambers a great deal of work which is now taken in hand by their subordinates, with a necessary subsequent reference or appeal to themselves; and the judges would be able to sit regularly in chambers during the day, instead of coming there after six hours of hard work, in a more or less exhausted condition of mind. In the Taxing Master's offices the great want is of assistant clerks to do the routine work of checking lengths of documents, vouching disbursements, and the like."

BOOK REVIEWS.

BLOUNT'S CUSTOMS OF MANORS.—This is a new edition of the "Tenure of Land, and Customs of Manors," originally collected by Thomas Blount, (in 1679), and republished with additions in 1784, and 1715. The present edition is by Mr. W. Carew Hazlitt, who represents the third generation of a family to whom literature owes a great deal, and to whom it may now be added that law will owe not a little. For this is a work which reflects a great deal of light upon the history of our law, which will be understood when it is borne in mind that manors and their customs still exist, and that ancient tenures not manorial also still continue to exist. Mr Hazlitt says very truly, that a reprint, after a lapse of nearly sixty years, of a work of such established and well merited reputation as Blount's Tenures did not seem to require an apology. And we may add, that on

the contrary, it has laid legal antiquaries and the lovers of legal history under a very heavy debt of gratitude to the spirited editor. Nor is it a mere republication for which we are indebted to Mr. Hazlitt, for a great deal of labour has been expended in corrections and improvements, and more than a hundred new articles have been added. In these, however, the editor explains that he has restricted himself to cases in which there was either a custom or a service. It should be added that in every case the authority is cited, and either the original is given in a note, or a reference to a place where it is to be found. It should further be stated that no expense has been spared in bringing out the work well. It is printed in fine clear type, on fine thick paper, and is, in size and appearance, uniform with the valuable publications of the Master of the Rolls, to which, it may be added, it forms a useful and valuable companion. For a knowledge of these ancient tenures and customs throws a vast deal of light, as has already been observed, upon the sources of our early history and law. Mr. Blount said himself in his preface, "I thought a collection of some remarkable tenures of land and unusual customs of manors might not be unacceptable to the student, when weary with poring over Littleton's Tenures and his learned commentator." He, however, appears rather to have contemplated diversion or entertainment, than any aid to study; but his editors perceived the importance of the old tenures as illustrations of law and legal history, and Mr. Hazlitt's remark is of a still graver nature when he observes that the result of the work is to show that our ancient landed gentry, in return for certain privileges, acknowledged certain substantial obligations and duties. It is undoubtedly true that legal history shows that originally no land was held—that is even in fee simple—except subject to certain services, which in respect of lands held of the owner were rendered to the Crown, and which, though in the course of ages they became obsolete and absurd, were yet originally of some substantial value, and whether rendered in money, or in kind, or in service, were of some use to the country in helping either to support the sovereign or defend the realm. This, no doubt, has an important bearing in a constitutional point of view, and especially as to the justice of throwing a fair share of taxation on the land, taxation being the only modern equivalent for these ancient services to the Crown.

LINCOLNS' INN, ITS ANCIENT AND MODERN BUILDINGS.—By Mr. Spilsbury, the Librarian. Nearly a quarter of a century has elapsed since the first appearance of this interesting work (which embodies an account of the library), and it is now presented, in a

new and elegant form, well suited to the drawing room, as well as the libraries of all members of the Inn, and all admirers of these ancient societies, and lovers of things ancient in general. Everything of interest in the history of Lincoln's Inn is clearly told. In the Introduction the origin and nature of these learned Societies is shown, and then comes the History of the Society of Lincoln's Inn, followed by admirable descriptions of its hall, its chapel, its library, and everything connected with it; not forgetting its connection with the general scheme of legal education. Altogether it is a most excellent little work, containing a great deal of curious and interesting information.

MANUAL OF PUBLIC HEALTH.—This is a book compiled for the use of local authorities, medical officers of health and others, by Mr. Michael, Barrister, Mr. Corfield, Professor of Hygiene and Medical Officer of Health; and Mr. Wanklyn, public analyst for Bucks. The whole is edited by Mr. Ernest Hart, who, in a brief introduction, thus explains the plan and object of the work. "Those who are called upon to carry out duties connected with the Public Health Act of 1872 have to deal with subjects involving three separate kinds of knowledge — legal, medical, and chemical. The duties are so multifarious, and, to many now engaged in them, they are so novel, that it seemed advantageous in the production of a Manual of Public Health, to secure the assistance of three gentlemen severally experienced in each of the three branches of knowledge involved. Hence the origination of this manual, in which I have had the advantage of the collaboration of three able and well-known authorities. Although I am responsible for the general construction and editorial supervision of the work, and for whatever faults may exist in it, such merits as may be found in its execution, will, of course, be properly ascribed to the authors, and not to the editor." The contents of the work are thus described: Chapter 1, the Central Authorities; 2, Local Authorities; 3, Officers and powers of local authorities; 4, Road and Ways; 5, Sewers; 6, Water Supply; 7, Public and Private Lighting; 8, Nuisances; 9, General, comprising a very useful index to powers and penalties under the Sanitary Acts. Then follow three chapters on "Positive Duties," "Refuse Matters," and "Water Carriage System." This will suffice to give a general idea of the plan and scope of the work, which undoubtedly is of a highly useful character, and is very carefully executed. The sanitary legislation, which has taken place within the last twenty years, and especially under the more recent Acts, forms one of the most remarkable features and characters of the

age; and it is presented in the work before us, in the most succinct and convenient form, and at the same time with the utmost care and accuracy.

HISTORY OF THE COMMON LAW.—By J. P. Yeatman. This work, the author assures us, embodies the labour of many years, and the subject is one of no small interest. It is the history of the Common Law of Great Britain and Gaul from the earliest period to the times of English legal memory. The object is to exhibit the primitive sources of our Common Law in its earliest state, and with that view Gaul is included as well as Great Britain. No doubt Great Britain formed a part of the Roman Province of Gaul, and the author agrees with Lord Coke and other learned writers in considering that the germs of our Common Law are to be traced back to the long period of the Roman occupation of this country. But the author goes back to pre-historic trials, and there we cannot follow him, for he is in the region of fancy and fable. There is another reason for including Gaul, and that is, that on account of the close connection between this country, and some parts of what is now called France, in later Saxon times, and still more so after the Conquest, when some provinces of France were united with this country under the same sovereignty, there would necessarily, on that account, be some community between the laws of the two countries. And this in point of fact is to be seen from a comparison of the *Coustumeir de Normandy* with the *Mirror of Justice*, or any other of the sources of our ancient law. The author's view in a word is that the Saxons were mere barbarians; and that the elements of law and civilization to be found in this country after their invasion must have been derived from other sources. He traces them in a great degree to the lengthened Roman occupation of Britain, during which it undoubtedly attained a high degree of civilization. This is the view upheld by Mr. Finlason, in his Introduction to his Edition of Reeve's History of the English Law; and it is not easy to understand why Mr. Yeatman should represent him as he does in his Preface as describing our "polished ancestors" as ignorant and barbarous. This is the description which Mr. Finlason gave of the Saxons, not the Romanized Britons, and Mr. Finlason fully recognized the importance of those elements of law and civilization which were derived from the Roman rule in this country. Indeed so much so, that he has been ridiculed by some writers for having carried the view too far, and Mr. Stubbs, in his "Constitutional History," first published, a work of great

interest and value, represents him as tracing trial by jury to this source exclusively. But this is doing him injustice in the opposite direction; for Mr. Finlason had likewise laid great stress, as Sir James Mackintosh had done, on the influence of the ecclesiastics, which that great writer considered the principal source through which Roman law and civilization acted in this country. To this source, however, Mr. Yeatman has been entirely inattentive, and hence he has done great injustice to the Saxon age. The Saxons, it is true, were barbarians, but their ecclesiastics were often men of great learning, and generally had some degree of education. The name of Bede alone ought to have reminded any one of this, and he mentions many ecclesiastics of his time in terms of eulogy for their learning. The learned Theodore, the records of whose labour are to be found in the Saxon Laws and Institutes, was only one among a number of learned prelates whose influence helped to illuminate the Saxon age. The name of Alcuin became illustrious in Europe, and the great Emperor Charlemagne recognized his worth and obtained the advantage of his assistance in the great work of restoring law and civilization. Among these Ecclesiastics were the authors of the Saxon Chronicle and the Life of Asser, and other records of the Saxon times, and there is reason to believe that they had a great influence in the composition of the later Saxon laws, secular, as well as ecclesiastical. Mr. Yeatman, indeed, rather rashly, and on grounds clearly untenable, denies the genuineness of all these documents, so that he would leave us without a line of information as to the Saxon age. Yet the history of Bede itself, undoubtedly genuine, informs us that the Ecclesiastics did write records of their time, and there is no reason, therefore, on earth, to doubt the genuineness of the Saxon chronicles and the life of Asser; and William of Malmesbury distinctly tells us that in his time there were histories in the vernacular, which all understood to mean the Saxon chronicles. While, as to the Saxon laws, they bear clear internal marks of genuineness, and Mr. Yeatman gives no good reason for doubting them. For a writer on the history of our laws to begin by denying the genuineness of all early records of it, is indeed hopeless. And Mr. Yeatman is inconsistent in denying the genuineness of the Saxon laws, while upholding those of Howell Dha. Nevertheless, Mr. Yeatman's work is, though unsound on these points, vigorous and lively, and embodies the results of much reading. This is only an instalment, being the first of four parts, which are to be issued, and, no doubt, when completed, it will contain much that is interesting and valuable.

MANUAL OF THE LAWS AND COURTS OF THE UNITED STATES.—

This work we are told is designed for lawyers and business men. It aims to give an accurate statement of the law in all the States and Territories of the United States, upon these subjects, in regard to which the lawyer or merchant having business interests beyond the limits of his own State, most frequently finds himself in need of information. It gives also the Courts of the United States, and a Directory of Practising Lawyers. The subjects treated of include attachment of property for debt, showing under what causes these remedies may be had; claims against estates of persons deceased, deeds, and mortgages, and the requisites for their execution, and their mode of acknowledgment and proof, and the rights of aliens to hold property, exemption of property from attachment or execution, limitation of action, notes, bills, and protests. In connection with this part of the book will be found forms of certificates of acknowledgment and proof of deeds and instruments, and forms for taking depositions. Altogether, the work appears highly useful for the purpose for which it is designed.

THE STATUTES REVISED.—VOL. V., 52, George III. to 4 George IV. (By authority, London, Eyre and Spottiswoode, 1874). The present volume contains the statutes now in force passed during twelve years. The work has been conducted on the same plan as that followed in the preceding volumes. The usual chronological table of statutes for the period contained in the volume is prefixed. We have to express our satisfaction at the speedy appearance of this volume, after that of its predecessor, and we hope that the work may advance rapidly towards completion. The chief practical benefit will be derived from those volumes that are still to come.

THE REGULATION OF RAILWAYS ACT, 1873, AND OTHER RAILWAY AND CANAL STATUTES. By J. M. Lely. (Sweet, Chancery Lane, 1873). Mr. Lely lost no time in producing a work on the "Regulations of Railways Act." This book contains all that such a book could contain, at the time it was published, by way of bringing together the law on the subject, and we would especially point to the history and summary of cases decided on the Railway and Canal Traffic Act, 1854, both by the English and Scotch tribunals. The arrangement of this table is clear and convenient; and from it at a glance can be seen the subject matter of complaint, the decision of the Court, and the ground of each decision.

CORRESPONDENCE.

COSTUME OF JUDGES.

To the Editor of the LAW MAGAZINE.

SIR,—

Will you or any of the correspondents of the *Magazine* kindly inform me whether the Judicature Act of last session will have the effect of superseding or in any way altering the costume as at present worn by the judges of the Superior Courts of Common Law when sitting in open court? As everyone who has read it is aware the Act practically amalgamates the three Superior Courts of Queen's Bench, Common Pleas, and Exchequer, while preserving for divisional purposes the name of each. The Act also renders it unnecessary that a judge, appointed after the Act takes effect, should be a serjeant-at-law. The variety of judicial costume that is worn by the judges at different times throughout the year, is to be accounted for by the fact of their being serjeants, and justices, or barons, as the case may be. Though only one kind of costume is worn by the serjeants when practising at the bar, we know that it was different in Chaucer's time, as appears from the description he gives of the serjeant in his "Canterbury Tales." Are not the distinctive forensic costumes which were then worn, now worn on the bench?

Will you, or any correspondent, also kindly inform me of any book that treats of this subject, or rather the subject of judicial and forensic costume of judges and lawyers in general?

I am Sir, yours, &c.,

AN ATTORNEY-AT-LAW.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

HILARY TERM, 1874.

At the final examination at the Incorporated Law Society the following special prizes were awarded:—*The Timpron Martin Prize* for candidates from Liverpool. — Mr. George Barrows Cummins having passed the best examination in the year 1873,

and having attained honorary distinction, the Council have awarded to him the prize, consisting of a gold medal, founded by Mr. Timpron Martin, of Liverpool. Mr. Cummins obtained a prize in Michaelmas, 1873. *The Atkinson Prize* for candidates from Liverpool or Preston.—Mr. George Hime having, from among the candidates, shown himself best acquainted with the Law of Real Property and the Practice of Conveyancing, having otherwise passed a satisfactory examination, and having attained honorary distinction, the Council have awarded to him the prize, consisting of a gold medal, founded by Mr. John Atkinson, of Liverpool. Mr. Hime obtained a prize in Michaelmas Term, 1873. *The Broderip Prize* open to all candidates.—Mr. Henry Nicholas Grenside having shown himself best acquainted with the Law of Real Property and the Practice of Conveyancing, and having attained honorary distinction, the council have awarded the prize, consisting of a gold medal, founded by Mr. Francis Broderip, of Lincoln's-Inn. Mr. Grenside obtained a prize in Hilary Term, 1873. *The Scott Scholarship*, open to all candidates.—Mr. Edwin Murcott being, in the opinion of the council, the candidate best acquainted with the theory, principles, and practice of law, they have awarded to him the scholarship founded by Mr. John Scott, of Lincoln's-inn-fields. Mr. Murcott obtained a prize in Michaelmas Term, 1873. *The Birmingham Law Society's Prize* for candidates from Birmingham.—The examiners also reported that among the candidates from Birmingham in the year 1873, Mr. Richard Alfred Pinsent passed the best examination, and was, in the opinion of the examiners, entitled to honorary distinction.

At the Final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following under the age of twenty-six, as being entitled to Honorary Distinction:—William Arnold Hepburn; John Archbald Dixon, Charles Gover Woodroffe; Charles Leopold Samson; Herbert Beaumont;—The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books, to Mr. Hepburn, the Prize of the Honourable Society of Clifford's Inn; to Mr. Dixon, the Prize of the Honourable Society of Clement's Inn; To Mr. Woodroffe, Mr. Samson, and Mr. Beaumont, Prizes of the Incorporated Law Society. The Examiners have also certified that the following Candidates, under the age of twenty-six, passed examinations which entitle them to commendation: James Grundy, Wilson Dawson, Arnold Heseltine, Isaac Gaitskell Jennings, William Morley, William Burd Pearce, John Alexander

Tilleard, Albert Watts. The Council have accordingly awarded them Certificates of Merit. The Examiners have further announced to the following Candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to Honorary Distinction if they had not been above the age of twenty-six: Thomas Mark Taylor, Richard Barker, the younger, who would have been entitled to Prizes, and Samuel Budd, B.A., Frank Geary, Thomas Hudson, who would have been entitled to Certificates of Merit. The number of Candidates examined in this Term was 169; of these 155 passed, and 24 were postponed.

APPOINTMENTS.

Mr. John Smale, Chief Justice of Hong-Kong, has had the honour of Knighthood conferred upon him; Mr. F. A. Redwell has been appointed Judge of the County Court (District No. 16); Mr. W. Fooks-Woodforde, Judge of the County Court (District No. 19); Mr. Edlin, Q.C., Assistant Judge of the Middlesex Sessions. The following have been appointed Queen's Counsel:—Mr. P. C. Gates, of the Home Circuit; Mr. F. A. Inderwick, of the Home Circuit and Probate Court; Mr. E. H. Pember, of the Midland Circuit, Parliamentary draftsman; Mr. F. A. Philbrick, of the Home Circuit, Recorder of Colchester; and Mr. G. P. Bidder, of the Home Circuit; the Lord Chancellor has appointed Mr. Henry J. L. Graham to be his Principal Secretary; the Hon. Edward P. Thesiger to be Secretary of Presentations; Mr. Edward Ross, Secretary of Commissions; Mr. F. A. Corley, Gentleman of the Chamber; Mr. J. A. Freeman has been appointed Town Clerk of Brighton. *Ireland*.—The Commissioners charged with the custody of the Great Seal of Ireland are the Right Hon. Sir Joseph Napier, the Right Hon. Mr. Justice Lawson, and Master Brooke. *Scotland*.—Mr. John Millar has been appointed Solicitor-General for Scotland. *Jamaica*.—Mr. G. H. Barne has been appointed Solicitor-General. *Hong-Kong*.—Mr. Francis Snowden has been appointed a Judge of the Supreme Court. *Africa*.—Mr. George Phillips has been appointed a Judge of the Supreme Court of the Straits Settlement; and Mr. T. T. Ford a Junior Judge of that Court.

THE LAW MAGAZINE AND REVIEW.

No. V.—VOL. III.—MAY, 1874.

I.—MEDICAL EXPERTS.*

By J. H. BALFOUR BROWNE, Barrister-at-Law, author of "The Medical¹ Jurisprudence of Insanity," &c., &c.

THIS does not seem to be an inopportune time to examine the question as to the use of experts in Courts of Law, and to endeavour to arrive at some definite principles in relation to the admissibility of their evidence. All sorts of absurd claims are, in these days, made in the name of science. Science is doing all the talking in our modern time, but it is a question whether it is making more real progress in the laboratory or on the platform, whether it is really wielding the sword with which it may conquer nature, or only flourishing the laurels it has already won. Never was there so much talking about science, but it must remain to be seen whether it is making as much progress through the froth and spume of this wide spread praise as in the days when folk were willing to talk less and do more. However that may be, its claims are enormous. It claims to be the only method of education, and men like Herbert Spencer and Huxley assert that no good is to be got out of the osteology of thought which lies in mathematics, or out of the vague knight-errantry of thought which lies chronicled in

* Responsibility in Mental Disease, by H. Maudsley, M.D., Professor of Medical Jurisprudence in University College. London, Henry S. King and Co., 1874.

history, but that in the facts of science alone there is nourishment for minds. But the claims of science in relation to law are no less striking, and it is curious to note that those scientists who are least well informed are the most exacting in their demands. This might seem strange at first, but a little consideration will show that this phenomena is explicable upon the ordinary principles that the greatest charlatans are those who demand the greatest amount of credulity. It has been asserted with some truth that it is slaves make tyrants, and it is certain that it is the credulous who create impostors. However, our experience of lawyers is that they are somewhat disinclined to yield a ready adhesion to this new creed of science, unless it can show the credentials which entitle it to be received at the court of belief, and these are good and sufficient reasons. We shall see what this new creed is in relation to the subject with which we have in this place to do. Dr. Maudsley is one of the prophets of this new religion of science. He writes well, and his books are read; and, possibly, he is believed in. He is one of those who is exorbitant in his demands for science, and who regards all lawyers as little better than numbskulls, because they are not prepared to accept medical evidence at more than its worth. In the work before us there is some gentle sneering at the late Lord Westbury because he condemned the evil habit which had grown up of assuming that "insanity was a physical disease." We have already had occasion to deal with the whole question of insanity in relation to law, and to point out that the undoubted fact which is asserted by medical psychologists that insanity is a physical disease, has nothing to do with the question of the irresponsibility of the insane in Courts of Law, or their incapacity to exercise the functions of citizens. No doubt every insane act is due to a certain disease in the brain, but those gentlemen who assert that would not deny that any act which a so-called sane man can perform is due to his organism, due to a certain change, say, in the convolutions of the brain. But although physiologists alone are capable of appreciating these changes,

it could not, we imagine, seriously be contended that all cases of contract should be submitted to them for their approval, and it does seem to us equally ridiculous to say that "the ground which medical men should firmly and consistently take in regard to insanity is that it is a physical disease, that *they* alone are competent to decide upon its presence or absence; and that it is quite as absurd for lawyers or the general public to give their opinion on the subject in a doubtful case as it would be for them to do so in a case of fever." Yet these are Dr. Maudsley's words. No lawyer wants, so far as we know, to give his opinion either as to insanity or as to fever. He does not profess to be able to do so, but he does assert that he and the public are in a position to judge of conduct, that the proof of the existence of such insanity as incapacitates for civil acts, or renders an individual irresponsible in case of the commission of a criminal outrage, lies in conduct, and that the fact that in the case of the insane the act is the result of certain changes which medical men have chosen to call disease, and that in the other it is due to certain changes which medical men have, with as much arbitrariness, chosen to call health, has nothing whatever to do with the subject. It is passing strange that persons of sound intelligence cannot see this, but that they will go on writing and speaking as most medical men write and speak in these days. We hear of the bench "frowning down psychological truth," and we have Dr. Maudsley claiming that insanity should be treated, "not as a subject of moral inquiry, but as a disease, to be investigated by the same methods as other diseases." As to this last claim, let us say one word. Law has nothing to do with the investigation of diseases. If a man had lost a leg, and it was necessary to prove that he could not have walked to a certain place in consequence of that deformity, all the evidence that will be necessary will be such as proves that he was legless; evidence as to the disease under which he laboured, and the necessity of the surgical operation are beside the point at issue. So it is in the case of loss of mind :

whether the cause of the loss be general paralysis or brain wasting, matters not to the lawyer, although it may to the psychological pathologist; but the question that law has to decide is this, was the individual at a certain time and in relation to a certain act, in such a relation as to knowledge and will, as that which is occupied by the majority of mankind when similarly circumstanced in connection with like acts? But enough has already been said on this point here and elsewhere. Lawyers are not likely to be turned from their staunch position by all the illogical vituperation which is poured out of such vials of wrath as are to be found in the breasts of those medical experts who have suffered a severe cross-examination, in which their threadbare theories fell to rags; and their high reputations looked but as ill-founded as their decrepit definitions and washed-out distinctions.

But we meant in this paper to deal with the question as to the admissibility of the evidence of medical experts, and to give those gentlemen who appear in the witness box certain little pieces of advice, which will probably share the fate of all advice, and not be taken.

The evidence of skilled witnesses have never met with much favour in courts of law, and it has been remarked that it is always the judges who have been the least able lawyers who have been the most willing to admit evidence of opinion. In modern times there has been a great reaction against authority. The right of private judgment has been claimed, and the worthlessness of the opinions of those who are not able to state facts upon which such opinions are founded, and the superfluity of the opinion when once you have the facts has been thoroughly recognised. But judges have long appreciated these facts in relation to evidence. The witnesses who came to speak to facts have been held in much esteem, those who came to speak to opinions or to draw inferences from facts, have had but little credit in courts of law.* Thus we find Lord Campbell remarking, "Skilled witnesses come with such a bias on their minds to support the cause in

* See Taylor on Evidence, p. 78, sec. 50.

which they are embarked, that hardly any weight should be given to their evidence," * and an able writer upon the Law of Evidence, has observed that when witnesses come merely to give their opinion "it is often quite surprising to see with what facility and to what extent these views can be made to correspond with the wishes or the interests of the parties who call them. They do not indeed wilfully misrepresent what they think, but their judgments become warped by regarding the subject in one point of view, that even when conscientiously disposed, they are incapable of expressing a candid opinion.† It cannot be doubted by any one who has paid even a trifling attention to the subject that the caution with which the courts have been in the habit of receiving this kind of evidence was well advised. Every thing that is objective is capable of confirmation. Thus a fact can, although it is sworn to by one person, be disproved by others, but opinion, in that it is subjective, is capable neither of confirmation nor of disproof. Can it be wondered, then, that individuals who are called upon to express their opinions are much less careful than those who come to speak to facts? This of itself takes away much from the value of such testimony. But, again, to judge of the value of an opinion one must be made aware of the real capacity of the individual who expresses it to form one. Not every medical practitioner, it will be admitted, is capable of forming a correct estimate of the value of certain diagnostic symptoms of an obscure brain disease. This again, then, introduces a large element of doubt and uncertainty, and shows how wise our courts of law have been in attaching very little weight to the evidence of skilled witnesses who expressed only opinion. Medical men have, to do them justice, seen the advantage which would accrue to them if they could induce Courts of Law to accept their opinions as if they were facts, and a

* Tracy Peer, 10 Cl. and Fin. 191. See also *Gurney v. Langlands*, 5 B. and A. 330. Neal's case cited 1 Redfield on Wills ch. iii., 13. *Gay v. Mutual Insurance Company*, 2 Biglow's Life Cases 14. per Woodruff, J.

† Taylor on Evidence (p. 73. sect. 50).

good deal of the vituperation about "frowning down psychological truth" is occasioned by the refusal of our judicial authorities to do anything of the sort. Thus Dr. Maudsley, who claims that medical men alone ought to be asked to decide whether insanity exists or does not exist, speaking of the experienced physician, says, "He may not always be able to impart to others an exact account of the steps by which he has reached his conclusions, unconscious acquisition and instinctive decision preceding conscious method and deliberate judgment, but his opinion may still be sound." May still be sound! And it is for this we are to deprive judge and jury of their functions and leave the determination of the guilt or innocence of every criminal in whose case there is a suspicion of insanity, (and in what case is there not such a suspicion?) to be determined by medical men who are only to be required to decide instinctively, to acquire the facts unconsciously, and who are not to be trammelled by the necessities which are incumbent upon all peddling human beings, of conscious method and deliberate judgment. There never was such a ridiculous attempt to revive the sway of authority, which would be the apotheosis of ignorance. For it is ignorance which wants to be believed without reason, it is ignorance which relies upon unconscious acquisition and instinctive decision. Knowledge is content to show the facts upon which it is founded; it can explain every step which brought it to its position of certitude, and can prove the deliberation of its judgment. No wonder Courts of Law have had a distaste for skilled witnesses, and especially for medical experts. But let us look at the law of the subject.

The object of all evidence is to place the jury in the position of eye and ear witnesses of a certain event, or a certain series of events, and the theory of the law in so bringing the facts representatively before the jury is that they, as ordinary men, uninfluenced by favour, or fear, by hatred or love, will be able to judge of the guilt or innocence of an individual if thus brought to view the act and the actor at the time the

deed was done. No doubt a person who saw a deed done might best say, first, who it was that did it, and, secondly, if it was done in anger or self-defence, but such an one might and probably would scarcely have that calmness and impartiality which would make a decision just and right, and the law by saying we will call those who saw the deed before twelve unprejudiced men, and ask them to decide upon the question of guilt or innocence, have, it seems to us, done well. But evidence is not always thus direct. Frequently acts are done when no eye or ear is near to see or hear what transpired. Thus take the case of a murder. No one, say, saw it done, but some one saw a man near the place where the murder was committed. Another person saw the same man washing his hands in a road-side pool. Another saw him burn a shirt. And a fourth recognised a knife which was found near the victim, as one which had been in the possession of the man who was seen near the place, who was seen washing his hands, who was seen burning the shirt. All these persons speak to facts. They say what they saw, and it is for the jury to draw or not to draw the inference whether the man who is sworn to as having done these several acts was the person who committed the murder. But there are many cases in which the jury simply from the statement of facts would be unable to draw any correct inferences, cases in which a correct inference depends upon a knowledge of certain facts which do not lie within the bounds of ordinary experience, and in such cases the law has allowed skilled witnesses to be called with the intention, as it seems to us, of supplying the peculiar experience which the jury, as ordinary men, are supposed to lack.*

* See *McFadden v. Murdock*, 1 Ir.R., C.L. 211. The rule is that witnesses possessing peculiar skill may be examined when the question to be decided so far partakes of the character of a science or an art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature. 1, *Smith*, L. C. 491, note to *Carter v. Boehm*. Although an expert must have *special knowledge*, no rule can be laid down as to the extent or amount of such knowledge necessary to entitle a man to be considered an expert.—*Ardesco Oil Company v. Gibson*, 68, Pa. St. 146; *State v. Wilcox*, 57 Barb (N.Y.) 604.

Thus suppose in the case of the finding of a dead body that a little wound is observed upon the corpse, and further suppose that some one, the accused, was seen to inflict this little wound, then the whole question as to the guilt or innocence of the accused will turn upon the consideration of the question as to whether the wound found caused death. People do die suddenly, and if an individual liable to heart disease died after a quarrel in which some one had inflicted a wound which wound had nothing to do with the cause of death, the person causing the wound is evidently not guilty of murder. So in the supposititious case, the preliminary question for the jury to decide before coming to a conclusion as to the guilt or innocence of the accused is, whether the wound could cause death.* Now, the experience of medical men is supposed, on the ground of the maxim, that "every person should be believed in his own art," to be the same in relation to those matters, that the experience of ordinary men is in relation to matters of business, and in such a case it has been customary to summon a medical man, not merely to speak to a fact—say of the existence of the wound—but to draw an inference from the facts—say of the size, the nature, the position of the wound—either observed by himself or described to him by what he has heard in court, and to say whether such a wound could cause death. But, although the opinion of witnesses founded on the case as proved by other witnesses at the trial is admissible,† it must be the opinion of a witness possessing peculiar skill, and it must be in a case in which from the nature of the circumstances inexperienced persons have not the means, or are unlikely to prove capable of forming a correct judgment without assistance.‡ A witness not a professional expert is not competent to express

Shelton v. State, 34 Texas, 662.

† R. v. Wright, R. and R. 456. R. v. Searle, 1 M. and Rob. 75, per Parke, J. Fenwick v. Bell, 1 O. and Kir, 812. Beckwith v. Sydebotham, 1 Camp. 117. Collett v. Collett, 1 Curt., 687.

‡ M'Fadden v. Murdock, 1 Jr. R., O. L. 211.

a general opinion on the question whether an individual was sane or insane, though when examined as to what he himself witnessed in regard to such individual, he may state the impression produced on his mind by what he observed ;* but he must state, if required, the facts from which his opinion is formed, so that the jury can judge of the value of his opinion.† This witness, then, is a medical expert. In many other cases medical men are summoned to give the jury the advantage of that professional skill and peculiar experience, which is necessary to the due understanding of the point at issue, and to the justness of the inferences which they have to draw from the facts proved. Thus, in many cases, questions as to the causes of disease, the treatment of sickness, the precise period of death, and the presumption of survivorship, or the chance of recovery, must come before courts of law, and in such cases it has been usual to have recourse to the opinions of medical experts. In no class of cases, however, has it been so frequent to ask medical men to assist the jury to draw inferences as in cases in which the sanity or insanity of an individual was in question, and in relation to no class of cases has the admissibility of this kind of evidence been so much canvassed.

The theory of the admissibility of this kind of evidence seems to us to be this. The law finding that technical knowledge was necessary in arriving at conclusions in many cases allowed witnesses to be called to supply that technical knowledge. The true method in placing the jury in possession of the required knowledge was in tracing some of the general principles of the science without reference to the individual case. The object was to make the jurymen medical men in relation to the point at issue, yet to leave them ordinary unskilled individuals in relation to the facts of the case which were to be gauged by their own common sense

* O'Brien v. People, 36 N.Y. 378. Clapp v. Fullerton, 34 N.Y., 190. See also Pike v. State, 49 N.H., 426.; per Doe J., and the authorities there cited.

† Oulver v. Haslam, 7 Barber, 314; Rambler v. Tyron, 7 Serg and Rawle. (Penn) 90; Clapp v. Fullerton, 24 N.Y., 190.

and every day experience. To do this it was necessary to put the jury in possession of medical experience in relation to the case, but as the jury could not go through the medical man's practice or walk the hospital with him, it became usual to allow the medical men to give the jury the result of his experience *quo ad* the point in question, that is to say, the medical men were allowed to express an opinion. But one thing at once became evident, and that was, that if medical men were to be allowed to express an opinion, say as to the sanity or insanity of an individual in a case where the question of guilt and innocence turned upon that of mental soundness or unsoundness, the functions of judge and jury would thereby become a farce. The jury would have simply to endorse the medical man's opinion, and the institution of trial by jury which, as Burke has said, is the object of the whole British constitution including two Houses of Parliament, King, and all the rest of it,* would be nothing more than an elaborate and ridiculous absurdity. But we do not trust the high function of the decision on guilt or innocence in any case to one man, even when he could be confronted by facts which are cognizable to the community, and it would be ill advised to trust such a function to one medical man, when the public would not be in a position to review his decision, and when the administrators of law have, from long and intelligent experience, come to the conclusion of the general worthlessness of the evidence of experts.† The proper use of experts really was to explain to the jury how they might themselves come to a conclusion as to a disputed point, not to come to a conclusion for them.‡ Thus in old days it was usual to

* It was all to him only the "method of getting twelve jurymen put into a jury box."

† See as to experts in military practice, *Broadley v. Arthur*, 4 B & C, 995—805—807—811.

‡ It is true that in New Hampshire, in 1871, judicial opinions were expressed that it was the function of experts to declare what irresponsibility is. *En Pike v. State*, 49 N.H. 890, Doe J. said, "The whole difficulty is that courts have undertaken to declare that to be law which is matter of fact. The principles of the law were maintained at the trial of the present case, when experts having testified as usual that neither knowledge nor delusion is a test, the

call frank inspectors who were supposed to be qualified to speak as to hand-writing, and in our own time we have an expert whose skill and opinion is much respected in cases where it is necessary to discover identity of or differences in written documents. But in those cases the expert not only says, "I think these are written by the same person," but he says, "I have come to that conclusion because in each of these writings the i is formed thus, and the b thus," and so on, and in this way he gives the jury the means of judging of the correctness or incorrectness of his inference.* So in cases where antiquaries have been examined as to the date of a certain document, or artists as to the originality of a picture,† or where an expert has been asked his opinion as to whether coins have been stamped in the same die, or whether wines have been taken from the same bin, in all these the skilled witness could give the grounds of his opinion, and if these seemed frivolous or insufficient his evidence might be rejected by the jury.‡ The great

court instructed the jury that all tests of mental disease are purely matters of fact, and that if homicide was the offspring of mental disease in the defendant, he was not guilty by reason of insanity." The doctrine that responsibility is a question of fact, to be determined by the jury on the evidence of experts, has been adopted by Dr. Mandale, who said, in these New Hampshire decisions, "an advance upon any judgment concerning insanity which has been given in this country, they put in a proper light the relations of medical observations to law in questions of mental disease." (pp. 105, 106.) These views are not only in conflict with all judicial authority, both in this country and America—which held and holds that although experts may be called to testify as to the states of mind and conditions of health, it is for the court to declare whether such states or conditions constitute irresponsibility—but are at variance from the true principles of reason, and have been repudiated both by jurists and physicians in America. (See Wharton on Mental Unsoundness and Psychological Law, 3rd edit., 1878, secs. 190—199.

* *Revett v. Braham*, 4 T.R. 497, *Moody v. Rowell* 17, *Pick* 490; *Corn. v. Carey* 2 *Pick*, 47; *Lyon v. Lyman*, 9 Conn 55; *Lodge v. Phipper*, 11 S. and R. 333.

† See *Folkes v. Chadd*, 3 Doug., 157.

• † Naturalists who have observed the habits of certain fish have been permitted to state their opinion as to the ability of fish to overcome particular obstructions in a river, which they are accustomed to ascend. *Cottrell v. Meyreck*, 3 Fairf., 222. It has been held that the question whether two pieces of wood were part of the same stick of natural growth is a question for an expert. *Commonwealth v. Choate*, 105, Mass 451. See also *Folkes v. Chadd*, 5 Doug. 157, *Ashby v. Lill*, 5 Bing 299.

difficulty arose, however, when experts were asked to come to a conclusion from the evidence they had heard. In such cases they were asked to do what the jury was there to perform. And it became necessary to frame some rule of law which would at the same time give the jury the advantage of the expert's skill, and still preclude the injurious influence upon their minds of an expression of opinion—of a person who came there with a reputation for knowledge—upon the very point they had to decide. An examination of a few of the cases will show the expedients which were devised to effect this double purpose. At the trial of Earl Ferrers in 1763 his counsel proposed to ask a medical witness "whether any and which of the circumstances which had been proved by the witnesses are symptoms of lunacy?" This question was objected to by the Attorney-General, and Baron Henley, observing that the question "tended to ask the doctor's opinion upon the result of the evidence," said that he "must be asked whether this or that fact is a symptom of lunacy."* Here there was an effort to get at the advantage of the medical experience without the disadvantage of a decision upon all the facts proved, which was obviously a question for the jury. On the trial of McNaughton,* an expert, who had heard the whole trial, was asked the question, "Judging from the evidence which you have heard, what is your opinion as to the prisoner's state of mind?" and it was not objected to. This question was evidently open to objection on the ground that before coming to any conclusion as to the state of mind of the prisoner, the medical man

* 19 Howell, 948. Lord Brougham, too, was of the opinion that it was well to preclude the medical witness from giving an opinion on the evidence, and regarded him only as a guide to the jury, a dictionary in which they might look and see if a certain act was an indication of insanity. "You shall ask them," he says, "if such an act is an indication of insanity or not; you shall ask them, upon their experience, what is an indication of insanity. You shall draw from them what amount of symptoms constitute insanity, but you must not ask a witness whether the facts sworn to by other witnesses preceding him amount to a proof of insanity."—87 Hansard, 614.

had in the first place to make up his mind as to the truth or falsehood of the facts deposed to. In the answers of the judges to the questions which the House of Lords, after the trial of McNaughton, proposed to them, they said, "Where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in the general form, yet the same cannot be insisted upon as a matter of right." In a case which was tried some six years after that last alluded to, a counsel proposed to ask a physician who had heard all the evidence, whether, from what he had heard, he was of opinion that the prisoner was, at the time he committed the act, of unsound mind. Baron Alderson would not allow the question to be put, and said that he was quite sure the decision with reference to a similar question in the McNaughton case was wrong. "The proper mode," he said, "is to ask what are the symptoms of insanity, or to take particular facts, assuming them to be true, to ask whether they indicate insanity upon the part of the prisoner. To take the course suggested, is really to substitute the witness for the jury, and to allow him to decide upon the whole case." * A similar rule of law has been laid down in America. There, in the *Commonwealth v. Rogers* † the Court said, "the proper question to put to the professional witness is this, 'If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them whether, in their opinion, the party is insane.' They are not," the court went on to say, "to judge of the credit of the witnesses, or of the truth of the facts, thus testified by others. It is for the jury to decide whether such facts are satisfactorily proved or not." This rule has also been put in force in cases in this country other than those in which the question of mental soundness or unsoundness had to be decided.

* *Regina v. Francis*, 4 Cox C.C. 57. See also *Doe dem Bainbridge v. Bainbridge*, 4 Cox, C.C., 451, per Lord Campbell. See also the judgment in the *People v. Lake* (12 N.Y. 359). *Carpenter v. Blake*, 2 Laws (N.Y.) 206. *Fingley v. Cowgell*, 48, Mo. 291.

† 7 Metcalf, 500.

the medical man take for granted the truth of all the evidence. By each method the expert's skill is made use of as a guide without being a governor of the will of the jury. Both in this country and in America there is cause for complaint that "Physicians mostly inclined to excuse many wrong acts of individuals on the grounds of disease." And that "juries are inclined, in too great a degree, perhaps, to take the opinion of a physician of good reputation and standing as to the insanity of an individual."* It is well then that there should be a means by which the testimony may be prevented from doing the mischief it is only too apt to do, when received: and it should always, as we have seen, be received, as of very inferior worth. Some such rules of law were absolutely necessary.

One or two other principles which are applicable to the reception of this kind of evidence must be alluded to. Its general worth has been estimated by an American Court. "Great respect," it said, "should be paid to the opinion of such a class of witnesses, but they are no more *controlling* than those of any other body of men when speaking upon subjects which lie within the range of common observation and experience."† One thing it is most important to note, and that is, that where an inquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it, the evidence of experts is not admissible. Thus in our own court opinions as to moral and legal obligations, or as to the manner in which other persons would probably have been influenced have been held inadmissible.‡ So the opinions of medical practitioners upon the question, as to whether a certain physician had honourably and faithfully discharged his duties to his medical brethren has been rejected because on such a point the jury

* *Juries and Physicians on Question of Insanity* by R. S. Guernsey, Esq., of the New York Bar.

† *Brehm v. Great Western Railroad Co.*, 84, Barber 256.

‡ *Campbell v. Richards*, 5 B. and Ad. 846. See also *St. Louis Mut. Ins. Co. v. Graves*, 6 Bush, Ky., 290.

was as capable of forming an opinion as the witnesses themselves.* Neither is the opinion of one expert as to whether a certain state of facts was enough to justify another expert in the formation of an opinion admissible.† Upon this the main point of the inadmissibility of the evidence of experts in questions concerning which the ordinary experience of mankind is a sufficient means of knowledge, one or two other cases may be mentioned. In the *People v. Bodine*,‡ in which it appeared that a corpse had been found partially burned and certain portions of the body covered with loose clothing were not burned, the opinion of a medical man that the person must have been dead before the fire broke out, as otherwise the covering would have been disturbed, was held inadmissible testimony. In another case, it was decided that the question whether a wound was caused by a blunt instrument or not, is not a question for scientific opinion.§ So in *Kennedy v. People*,|| it was held that the opinions of the medical witnesses as to position of the body when struck, inferred from the nature of the wound they examined, were not admissible as evidence. Now as the question of the sanity or the insanity of an individual is a question of conduct, as well as a question of nosology, as a man is regarded as insane who acts in a way different from that of the majority of his fellows, it might well seem that the evidence of the experts in such cases was inadmissible. It has been maintained on high authority that persons of common sense, conversant with the world, and having a practical knowledge of mankind, if brought into the presence of a lunatic, would in a short time find out whether he was capable or not of managing his own affairs.‡ Dr. Ray, too, in some useful

* Taylor on Evidence, p. 1226.

† *People v. Hartung*, 17, How N.Y. 151. *Tallis v. Kidd*, 12 Ala. 684.

‡ N. Y. Court of Errors, 21 Denio 281.

§ *Wilson v. People*, Parker's N.Y. Criminal Reports, 619.

|| N.Y. Court of Appeals, 5 Abbott, N.S. 147.

* It is a well understood rule of law that witnesses not experts may state their opinion, based on personal observation as to a person's sanity. See *Wright v. Totham*, 5 Ol. & Fin. 670; 4 Bing, N.C. 489. See also the elaborate judgment of Doe J., in *Pike v. State*, 49, N.H. 426, where the English and American authorities are fully quoted. See also, *Broadman v. Woodman*, 47 N.H., 144.

hints to medical witnesses, advises them to be prepared with "a well ordered, well-digested comprehensive knowledge of mental phenomena in a sound as well as an unsound state," and recommends Shakespeare and Molière as preferable text books to Stewart and Locke, showing that it is the practical knowledge of character in its relation to conduct that he regards as the most important requisite, in the way of knowledge, of a medical witness.* Mr. Guernsey, in the pamphlet to which we have already had occasion to refer, says, "There is no question that arises in the administration of the law where expert testimony may be less necessary, and where it should be less controlling on a jury, and where the common observation and experience of men should prevail over all theory as in cases of alleged insanity." There is some truth in this view of the matter, and it is only natural that after a long experience of rash witnesses, who having really no right to an opinion at all, have expressed crude generalizations with an imperturbable effrontery; after a harassing experience of the unbounded demands of alienist physicians to be believed with an implicit faith which was only compatible with the grossest ignorance, lawyers should assert the utter uselessness of the evidence of scientific witnesses in relation to questions of insanity. But although we would guard against too great weight being attached to the opinions of experts, while we would prevent as far as possible an undue influence of their opinions on the minds of the jury in relation to the particular case, we would be unwilling to exclude experts from Courts of Law. It is true that insanity is to be judged of from an observation of the conduct of the persons, whose mental condition is in question, in relation to the ordinary conduct of mankind, but in many cases of insanity the aberration only manifests itself at rare intervals, or in relation to particular persons,

* He says, "The expert should learn to distinguish the thoughts and manners of the one condition from those of the other, and endeavour to gain a ready perception of the general air and tone characteristic of each." *Medical Jurisprudence of Insanity*, p. 622. Or, in other words, improve the general experience of mankind.

things or circumstances. The conduct of the individual may be exactly like that of ordinary men and women except at particular times, or when the individual is particularly circumstanced. In such a case the ordinary experience of mankind would be a sufficient guide to a correct conclusion as to the mental condition of the accused if the attention of the jury was called to that particular phase of the disease, and to the fact that what is alleged in relation to the accused has been observed in collateral cases, and for this purpose we cannot but regard skilled witnesses as likely to be of use in the careful administration of the law. We would, however, almost feel inclined to allow the jury to find a verdict subject, if they thought right so to leave it, to an opinion upon the part of an unbiassed expert that the person was sane or insane, as the case might be. The expert would not in this way be brought before the jury and would not be examined as a party witness, but as a witness for justice. His opinion on the facts submitted to him would thus become a valuable precedent, and the decisions of a succession of experts, guided each by the written judgments of their predecessor, amenable to public criticism, would become a valuable body of medical decisions.

One or two other remarks may be made with reference to the evidence of skilled witnesses. They may refresh their memories by referring to professional treatises. This fact seems scarcely to be known to medical men. It is true that medical books are not directly admissible in evidence,* but although it has never been definitely sanctioned, it seems the better opinion, that a physician may strengthen his recollection by referring to such works as he considers authorities, and may, after such reference, be asked if his judgment is thereby confirmed.† And a medical witness has been examined as to whether he has not in the course of his reading found a certain mode of treatment prescribed, and he has

* *Collier v. Simpson*, 5 C. and P. 74, per Tindal, C. J. *Cocks v. Purday*, 7 C. and Kir. 270.

† *Taylor on Evidence*, p. 1280 § 1279.

been permitted to state that his judgment has been founded in part on the writings of his professional brethren.*

The whole question of the expediency of the admission of the evidence of skilled witnesses has been in considerable obscurity, and the tendency of the times seems rather to be towards the limitation of the recourse to this means of knowledge. This might have been expected. These are the days of wide-spread information, and the more knowledge widens the more information becomes general, the less will be the necessity for the special teaching of experts upon every little minute point which might formerly be regarded as a subject of science and art. When few were able to write experts in handwriting were a necessity, and the same remark is true of other matters. The smattering of science which is scattered about by a teeming press and from thousands of platforms, goes far to make the explanations of the expert, as to the facts upon which his opinions are founded, the more easily appreciable by the juries of our courts. Still cases do occur in which experts must be employed, and we have endeavoured in this paper to point out the doctrines of the admissibility of skilled testimony and to show the worth of such evidence when it is received.

* *Collier v. Simpson*, 5 O. and P., 78. Thus foreign lawyers called to prove a foreign law may refer to text books, statutes, codes, &c. As to American law see *Cort v. Wilson*, 1 Gray 837, *Washburn v. Cuddihy* 8 Gray 480, *Ashworth v. Kittidge* 12 Cush, 198, and *Bowman v. Woods*, 1 Iowa, 441; *State v. O'Brien* 7 R.J. 886.

II.—THE TERMINOLOGY OF THE ENGLISH LAW OF PROPERTY.

THE English law is peculiarly unfortunate in its terminology and classification. Especially in that department of it which relates to property are its terms and distinctions unhappy. Even the primary and most important divisions are ill-founded and badly expressed; and there is scarcely a leading phrase that is not either inappropriate or misleading. Its fundamental distribution of property into real and personal; and the subordinate divisions of real property into corporeal and incorporeal hereditaments, and into freeholds and estates less than freehold, are about as objectionable as any divisions and expressions possibly could be. Some of the objections which may be urged against them form the subject of the following comments.

I. REAL AND PERSONAL PROPERTY.—Of all the distinctions, purely technical and accidental, confusing and useless, which disfigure the English system of law, and render it complicated and uncognoscible, this absurd and unfounded division of property into realty and personalty is probably the most unjustifiable and the least useful. There is absolutely nothing to be said in its favour. Let every allowance be made which can be made for the historical reason so frequently adduced to explain the origin of it; and a further allowance for the natural tendency of mankind in general, and of lawyers in particular, to continue things in the condition in which they have been, and their consequent reluctance to depart from terms and distinctions which have become established; this division of property into real and personal still remains a blot upon our legal system. For a blot surely must be considered a distinction, a method of arrangement, which, while it has never been of the slightest practical utility, has been a source of considerable intricacy and confusion. That it is thus wanting in utility, and has produced

needless complication and perplexity, will appear from the following considerations.

In the first place the terms real and personal are utterly devoid of significance. Standing alone and unexplained they are meaningless. This of itself might not be a very serious objection, if, when once explained, they could be easily understood. But this is not the case. The terms are quite incapable of definition. They not only of themselves convey no impression of their meaning, but no description or explanation renders them at all significant. The utmost that explanation can do is to enumerate what are the various objects to which each of the terms applies. Why certain subjects of property are "real," why certain others are "personal," is not in the slightest degree suggested by a knowledge of what those subjects are. By historical research the origin of the terms may be got at, but this does not get rid of the objection. The words are still as meaningless as ever. Their application to the purpose they are intended to serve is purely arbitrary. Any other two words selected indiscriminately from a dictionary would be quite as significant. The only way in which their employment is defended or explained by writers on law is by a reference to their origin. And how little is known even about this, their only apology, may be seen by turning to the books. All we get is the conjecture of the author, no authoritative information, only an opinion. Whatever the reason for this application of the terms may have been, the information we have regarding them is insufficient to justify their use. We are told that formerly property was divided into land and goods; that the essential difference between them was to be found in the remedies for the deprivation of either; and that land came to be called real property, because the real land itself could be recovered; and goods personal property, because the proceedings must be had against the person who had taken them away. However correct this may be as a statement of the reason why these terms came to be so used, it is certainly no justification of their being so used. The expla-

nation adds not at all to their significance. It leaves us in the same doubt as to the exact meaning it is proposed to attach to "real." If we are to believe that the term real is employed because "the real land itself" may be recovered, this rather adds to the confusion, for if so we must take "personal" as being synonymous with "unreal," and attribute to land a reality, an actuality, which is wanting in goods and chattels, which is absurd. The terms obviously are not used in this sense, as the explanation seems to imply. Nor, indeed, is there any other sense in which they can be properly used. They are senseless and without meaning.

Not only are the terms objectionable, the distinction they represent is untenable. The only true basis of classification is some characteristic and generic difference between the subjects of the opposed classes. When, therefore, we find property primarily divided into two great classes—realty and personalty—we expect to find some clear and well defined point of difference between them, which, for the sake of convenience, has been adopted as the basis of the division. But there is none—none, certainly, in the physical nature of the subjects which compose the two classes; none in the modes of property or kinds of rights of which they are susceptible; none in the methods of acquisition or transfer of property. The only general practical distinction between them is that property which is called real descends on intestacy to the heir; property which is personal to an administrator for the benefit of the next of kin. In no other respect can they, with any degree of accuracy, be opposed to each other. And this being so, the mode in which they pass on intestacy is sometimes taken as the basis of the division, and real property is defined to be that which descends to the heir, personal that which does not. But this is a definition altogether inadequate. It is not a definition of the nature of the property, it does not indicate any generic difference between the things which happen to go to the heir and those which do not; it makes the primary division of the law of property depend on an accidental and comparatively unim-

portant provision of the law, one which becomes inapplicable whenever a valid will is made, and which is threatened with repeal.

The absence of any generic and characteristic difference between the two classes will be at once perceived on comparing their contents and the rights enjoyed in them. First, as to their contents. So far from there being anything in the physical nature of the various subjects of real and personal property to warrant the distinction, we find that the very same thing may be at once real and personal property. Thus, land which forms by far the larger part of real property, may also be a subject of personal property. We may even find the same piece of land at one and the same time both real and personal. Being in the possession of a tenant for years it is personalty; as the subject of the lessor's reversion it is realty. Land, indeed, is scarcely less a subject of personal than of real property, since it is almost as frequently found possessed under a lease as by the owner. Nor, on the other hand, are moveable things exclusively personal property. Heir looms, animals *feræ naturæ*, for instance, are considered real property. And shares in a Company which are generally personalty are sometimes realty, for example, New River shares. Titles of honour, also, are real property. It is obvious, then, that the distinction between real and personal property does not correspond with the natural distinction into immoveables and moveables; nor, indeed, is it founded on any difference in the nature of the subjects of property.

Nor as regards the modes of property do we find any generic difference, any common mark which distinguishes the subjects of one class from the subjects of the other. It is almost sufficient in support of this assertion to refer to the respective estates of a tenant who holds under a lease for lives, and of a tenant whose lease is for years. The former has real property, the latter personal. Yet the estate of the one is not in a single material particular different from that of the other. This, of itself, seems enough to show that

there can be no essential difference between the modes of property in realty and personalty respectively. But there are several supposed differences of which some show is sometimes made and which require notice, from the importance which it is attempted to attach to them. We are told, for instance, that there can be no such thing as absolute property in realty ; and on the other hand, no property in personalty that is not absolute ; that in realty only estates can be held, but that no estates can be created in personalty. The first of these assertions is a distinction without a difference, the second is fallacious. For all practical purposes an estate in fee simple in land may be regarded as conferring absolute property, a property as absolute as does ownership of a chattel. That the fee simple is a subject of tenure, and merely held of the crown or some mesne lord, makes not the slightest practical difference. The tenant in fee is in precisely the same position, has exactly the same unrestricted rights of using and disposing of the land, as if the doctrine of tenure was no longer recognised. Whether on his death his land will escheat or go to heir or devisees is a matter of no importance to him, and has not the slightest effect on his ownership. As to the other assertion that there can be no estates in personalty, that there must be either absolute property or no interest at all, it is clearly erroneous. An estate in personalty is created, for example, by every underlease ; or whenever personal property is settled, as it may be and frequently is, on one person for life with remainders over. It is quite obvious that there may be property in a chattel which is not absolute.

Nor in the forms of transfer is there any generic difference between the two classes. It is true that some of the things which compose the class of personalty may be transferred in a manner which would be insufficient for the conveyance of real property, *e.g.* by mere delivery. But then there are other things in the same class for which mere delivery would be as insufficient as for realty. Generally speaking, real property must be conveyed by deed ; but there are also

certain interests in personality for which a deed is not less requisite than for real property, for example, a lease for more than three years. Moreover, there is no common mode of transfer amongst the various subjects of personality. Terms of years, policies of insurance, stocks and shares, for example, are assigned in methods differing both from each other, and from the ordinary means of disposing of "goods."

On what then does the division depend? Simply on this, that, in case of intestacy property which is real descends to the heir, and property which is personal to the administrator for distribution amongst the next of kin. There is absolutely no other generic difference between them; and if the law of primogeniture should be abolished, and there seems some prospect of it, the two opposed classes would be left without a single common mark whereby to distinguish the subjects of the one from the subjects of the other.

II. CORPOREAL AND INCORPOREAL HEREDITAMENTS.—

Unlike the terms real and personal these expressions are not without significance; but, as used to represent the distinction they are intended to indicate, their very significance becomes an objection, by reason simply of its tendency to mislead. They do not accurately denote the purport of the distinction; but this is not the only objection, for the distinction itself is illogical and useless. It is thus stated by Blackstone; "Corporeal hereditaments are such as affect the senses, such as may be seen and handled by the body; incorporeal are not an object of sensation, can neither be seen nor handled, are creatures of the mind and exist only in contemplation." On the face of it this distinction seems intelligible, worthless indeed, but understandable. But unfortunately it does not mean what the definition represents it as meaning; and when its real purport comes to be seen by examining the various subjects to which the expressions are applied, it ceases to be intelligible and becomes absurd. As the distinction stands it appears to mean this, that the subjects of property are corporeal; the rights which exist over those subjects, incorporeal. This was the sense in which the terms were used

by the Roman Lawyers and as thus used the only objection to the distinction is that it is useless. But the English lawyers have borrowed the terms, without the meaning and attached to them a rather peculiar signification of their own. With us the distinction is not a distinction between the subjects of property and the rights of property, but certain subjects of property of one species are absurdly opposed to certain rights of property of a different species, the term hereditament being in the one case employed to signify the land itself; in the other case it is used, inconsistently with its former meaning, to denote certain rights existing over land. Were it always used in the same sense, every hereditament would from one aspect be corporeal, from another, incorporeal. This is very clearly pointed out by Mr. Austin in his matchless Lectures on Jurisprudence. He says: "If the hereditament mean the right itself, that is always incorporeal, not less in the case of what are called corporeal than what are called incorporeal, hereditaments. If the hereditament mean the subject of the right, the subject of an incorporeal hereditament is as corporeal as the subject of a corporeal hereditament. For instance, a right to tithes is an incorporeal hereditament, and the right is incorporeal; but so is the landlord's right to the estate itself, yet that is called a corporeal hereditament. The subjects of both rights are the same: the land itself, or its produce, which are of course corporeal." (Vol. ii. p. 708.)

To take some other examples, a right of way, a right of common, rights to watercourses, rent-charges, are all called incorporeal hereditaments. Well, undoubtedly, the rights themselves are incorporeal, as all rights must be. But so, also, are the rights of the owner of the land, with regard to which they exist. And, inasmuch as they all issue out of the land, their subject is necessarily corporeal. The distinction, consequently, depends merely on the employment of the term hereditament in two different senses inconsistent with each other; and the two classes of hereditaments, therefore, cannot be reasonably opposed.

Nor is the distinction in any way useful. It is not followed by a single practical consequence. It is true that before the present reign there was a sort of difference consisting in corporeal hereditaments "lying in livery," while incorporeal lay "in grant." But whatever operation this doctrine formerly had it can be of no effect now, since by the statute 8 and 9 Vict., c. 106, it is enacted that "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." Moreover, there is no common characteristic amongst the various hereditaments called incorporeal to entitle them to be classed together. Some of them might be very properly classed together and opposed to property under the name of servitudes or easements, but there are others which have no element in them wherewith they could be made to coalesce. Rights of way, rights of common, rights of lights and water, franchises, advowsons, rents, seignories, right to a pew, right to support from neighbouring soil, tithes, annuities, form a class indeed heterogeneous and anomalous, and are without a single property in common, except that they have been thrown miscellaneously together, and distinguished from estates in land by the title "incorporeal hereditaments."

III. FREEHOLDS.—"Freehold" is a word which bears at least half-a-dozen different meanings; meanings which from their variety and their cross-distinctions it would be impossible to embrace within a single definition. As denoting a species of tenure we find it opposed to copyholds, and in this sense it is defined in *Stephen's Blackstone* as synonymous with the term "free socage," a definition which is supplemented by the following note: "It may be worth while to remark that the term freehold was inadequate to express the particular kind of tenure; as it was indifferently applicable both to knight service and to free socage, and accordingly we find from Lord Coke that it was only used to express that the holding was not base; but, as by the abolition of knight service free socage has become the only

free lay tenure, freehold is now taken as equivalent with free socage." (Sixth edition, vol. i, p. 219 and note).

Taken in a narrower sense as a term for distinguishing certain "estates" from certain others, it has been invested with several very different and conflicting meanings. In the book one is naturally inclined to turn to for a common law definition on this subject—*Littleton's Tenures*—it is laid down that "every one which hath an estate in any Land or Tenements for term of his own or another man's life is called Tenant of freehold, and none of a lesser estate can have a Freehold, but they of 'a greater estate have a Freehold; for he in Fee simple hath a freehold, and tenant in tail hath a Freehold." Commenting on this my Lord Coke confuses rather than explains. He extends the description beyond its intended and proper limits by including a distinction between tenures in a definition whose sole subject is estates. He says, "Here it appeareth that Tenant in fee, Tenant in tail and Tenant for life are said to have a frank tenement, a freehold, so called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage or customary or copyhold lands." (*Institutes* Book i, chap. 6, sec. 57). These definitions of Littleton and Coke added to that previously mentioned afford authority for three of the distinctions commonly met with, namely, freehold *v.* copyhold, estates of freehold *v.* estates less than freehold, freeholds *v.* leaseholds.

But this is not all. Blackstone and Lord Mansfield are yet to be heard. The celebrated commentator makes possession the basis of his definition of "freehold." He prepares the way by quoting Britton and "Doctor and Student." The former, he says, defines *liberum tenementum* "the possession of the soil by a freeman," and in the latter St. Germyn tells us that the "possession of the land is called in the law of England the frank tenement or freehold." Then Blackstone proceeds: "Such estate therefore, and no other, as requires actual possession of the land, is legally speaking freehold; which actual possession can, by the course of the common

law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold, that it is such an estate in lands as is conveyed by livery of seisin or in tenements of an incorporeal nature by what is equivalent thereto." (*Commentaries* book 2, p. 104).

A remark as to the distinction between the old and modern meaning of "freehold" is attributed to Lord Mansfield—that instead of (as formerly) signifying the whole fee, it now denotes the duration of a man's estate or interest in the land, that is, instead of being applied, as formerly, to express the nature of the term, it is now applied to signify the duration or extent of the interest which the individual takes in the inheritance. In other words the inheritance may be split into numberless estates of freehold, instead of the freehold signifying as formerly the whole fee. (See note in *Watkins Conveyancing*, Sixth edition, p. 64.)

The same learned judge (according to the note to which reference has just been made) went so far as to question whether the term freehold has really any definite meaning. He says: "the statutes passed for the prevention of subinfeudation and for the removal of restraints on alienation together with the frequent releases of feudal services, the statutes of Uses and Wills, and the total abolition of all military tenures have left us little but the name of freehold, without any precise knowledge of the thing originally intended by that sound."

Thus enlightened by the teaching of the learned, the student proceeds to apply the principles of the books to his practice in conveyancing. He takes up a lease for lives. Having learnt that every estate for life whether for one's own life or for life of another or lives of others is a freehold and having been taught to distinguish carefully between estates of freehold and estates less than freehold, having moreover learnt to oppose even more carefully estates which are real property and estates which are mere personalty, and bearing in mind also that a term of

years is at once an estate less than freehold, and a species of personal property, he expects, and not without reason, to find an essential and radical difference between an estate for life which is realty and freehold, and a term of years which differs therefrom in being neither freehold nor realty. From this lease for lives therefore must be excluded everything which savours of such inferior creations of the law as terms of years, estates which are less than freehold and which are personalty. His subject is exclusively freeholds. Determined to make the best of his opportunity of mastering the characteristics of a freehold estate as observable in conveyancing, he notes carefully the form of the instrument before him and the relations which it establishes between the lessor and the lessee. Some of the incidents of a freehold estate, he concludes, are that one of the parties is landlord and the other tenant, that the freeholder, *i.e.* the tenant in whom a freehold estate has become vested, is under an obligation of paying rent and keeping the premises insured and repaired, and that as the tenant for life or lives has obtained a freehold estate, it may be supposed that the freehold is no longer in the landlord. These first impressions of what a freehold is in practice does the lease for lives impart to his mind. Yet different, he begins to think, from his first conception of a freehold—that which he derived from reading the text-books. He had always expected to find some such a form as this, not for the conveyance of a freehold, but for the creation of a lease for years. He turns to a lease for years and finds his expectations fulfilled. It is just as he thought it ought to be, but also, which is certainly not according to his expectation, and somewhat puzzling, it is precisely the same as a lease for lives. The only difference is that the duration of the estate is in one case measured by years, in the other by lives. Yet by the one a term of years, a mere chattel, an estate less than freehold is created: in the other an estate of the opposite class, freehold and real property, is conferred. To add to the confusion, he observes that both kinds of estates are called leaseholds. Here then is an estate of

freehold which is also leasehold—an estate of freehold, moreover, which has more of the term of years in its character than of the other estates of freehold. It is different even from what he has supposed an “estate for life” to be. If, then, a term of years is put in a class of estates which are considered essentially distinct from that other class in which are included estates in fee simple and fee tail, ought not, he may naturally inquire, an estate for life to be placed in the same class, seeing that it is more like a term of years than a fee simple? But then he remembers that a life estate is not only freehold, but also real property, so that it would never do to classify it with such inferior estates as those which are merely personalty and less than freehold. And so for the sake of preserving the important institution of “freeholds,” of maintaining in their integrity old terms and old distinctions, obsolete and meaningless though they may have become, the student must be willing to make the best of it and console himself, if consolation he need, when the reason of his difficulty is such a worthy principle as veneration for antiquity, by the reflection that in studying English law he is not studying a science, and that he will pass muster as an able practitioner if when a conveyance is required from him he knows what sort of a precedent to copy from.

But though in the law of England at the present time, or rather in the mode in which it is studied, there may be little that is scientific, it is capable of being made so; and we hear so much just now of the value of a scientific training for the law that it is almost time we began to hear of something being really done. One very important thing to be done would be to weed out all useless and misleading terms and distinctions. In the law of what is called real property there is no word which could be more advantageously expunged than this word freehold. It could be removed from the vocabulary of terms of law without the slightest difficulty. It is used principally as a word of classification; but as a word of classification it is utterly worthless and worse than

worthless, for it not only expresses nothing that could not be better expressed without it, but it tends also to mislead. As opposed to copyholds it is worthless; in every other sense in which it is used it is misleading. Relatively to tenure, in which sense it is used to distinguish from copyholds, it is synonymous with free socage. What more easy, then, than to discard this sense of the word freehold and to substitute for it free socage? The term free socage would not only do equally well, but it is a term which actually is used for the purpose. So that instead of having two equivalent expressions, one of which means also something else which the other does not, we should have a single term which would never mislead because never used in any other sense. If, then, copyhold tenure is still to continue to have a place in our law, though what possible use there is in its maintenance it is difficult to see, tenure which is not copyhold would be far more conveniently distinguished by the term "free socage" than by "freehold."

The term "freehold" would still remain, but now applicable exclusively to estates. It remains to enquire whether it could not here also be advantageously dispensed with. In the first place, let us see with what meaning it is to be taken when used relatively to estates. It may be described as, in this sense, including estates in fee simple, fee tail, and for life. All other estates are deemed not freehold. Hence the primary division of real property in some of the text books into estates of freehold, and estates which are less than freehold. To this division there is no objection on the ground of logical arrangement. The only objection is that, true though it may be, it is perfectly useless, and, what is worse, it is misleading. It is a logical division, inasmuch as the term freehold has been applied only to certain estates, and denied to all others, so that estates which are freehold may be opposed consistently enough to those which are not, and these latter being, by reason merely of their not being freehold, in contemplation of law less than freehold, the division of estates into freehold and less than freehold

represents a recognized distinction. But this distinction being nominal rather than real, being founded on reasons which have now no existence, its retention is not only useless but misleading : useless, because there is not any essential difference between estates of the two classes ; misleading, because it suggests that there is. When we find the primary division of real property based upon a supposed difference between estates, we naturally expect to find that the difference is an essential and radical difference, or at least that it is a difference productive of some important practical consequence. Here there is neither. What essential difference can there possibly be when an estate belonging to the one class may be found created in precisely the same way and conferring exactly the same rights as an estate of the other ? The estate for life of the lessee, for lives differs not in a single important particular, from the estate for years of the lessee for a definite term ? Both are in the same position so far as their powers of user and disposition of the property are concerned ; both hold under a lease, and a lease of exactly the same form of construction. Against this similarity between them is opposed merely the paltry distinction—a distinction now without a difference—that in the early ages of the Common Law a lease was deemed unimportant, and not worthy of being invested with the dignity and title of a freehold. On this ground alone is it that the leading distinction of estates into freeholds and less than freeholds has been preserved. At the present time it represents merely a historical difference which has become inconsistent with fact. For inconsistent with fact it must be to designate as less than freehold an estate which is precisely the same as one of the estates called freehold.

Should the term, then, be abolished ? Without it we should be without a term of very frequent usage, a term used repeatedly in all the books. But this can scarcely be considered a valid objection when it is a term of such varied, indefinite, and misleading meaning ; and a term, moreover, the place of

which existing language is quite adequate to supply. In fact it is just such a term as, notwithstanding its frequent occurrence, could be most easily dispensed with. The terms fee simple, fee tail, for life, for years, at will, at sufferance, are their own interpreters. They need no supplemental appellation. To put them into two classes, one called freeholds, the other not freeholds, is quite superfluous, and answers no purpose whatever, except to mislead by indicating, what is not true, that there is a radical difference between the two classes. A far more significant and useful classification would be to divide estates into those which confer absolute property and those which do not, and then, under the head of limited property, to distinguish between estates for life and estates for years by a division indicating the only real difference between them, *i.e.*, a division into estates of definite and indefinite (though limited) duration.

But to expunge only this word freehold would be but a very partial and inadequate remedy of the many evils which beset the distribution and expression of the law of property. Nothing short of a reconstruction of this department of the law by means of new distinctions and fresh terms would be sufficient. So long as the divisions of property into realty and personalty, corporeal and incorporeal hereditaments, are retained, the retention also of the term freehold would not be a very great aggravation of the evil, and its abolition might be opposed on the ground of the objectionableness of patchwork legislation. What is wanted is demolition and reconstruction. Until this can be obtained, tinkering and amendment are to be condemned, for they might make the evil worse rather than palliate it. Such a remedy as is required would doubtless meet with opposition, for it would effect a complete revolution of the terminology and classification of the law of property. But enough has been said, it is submitted, to justify a condemnation of the present terms and distinctions and a hope for better.

W. W. T.

III.—THE MARRIAGE LAWS.

By the Rev. DANIEL ACE, D.D.

IN view of approaching legislation on the subject of the amendment of the Marriage Laws of the United Kingdom we give the following summary, which formed part of an interesting Paper read at the late Social Science Congress at Norwich.

With respect to the proceedings necessary to constitute marriage, the law of England differs from the law of Ireland in many ways; and the law of Scotland is wholly dissimilar to both of them. Valid marriages, so regarded in Scotland or Ireland, by decrees of their respective courts, have been, on appeal, reversed by the House of Lords, in England; and the most solemn ceremonies, affecting not only the interests of the contracting parties, but their offspring, declared null and void. This vagueness and uncertainty in a branch of jurisprudence which ought, of all others, to be clear and explicit, has been fitly designated by Lord Chancellor Selborne, as "scandalous to a civilized country," and, in its operations, must have been productive of an immense amount of practical hardship, patent injustice, and wanton cruelty.

Three cases have of late years obtruded themselves upon public notice to illustrate the necessity for an amendment of the laws of marriage, appertaining to the diverse yet united kingdoms of this realm. They are as follows:—1. *The Queen v. Millis*, 1843-44 (10 Cl. and Finn., 534); 2. *Beamish v. Beamish*, 1861 (9 H. and L. cases, 274); and 3. *Yelverton v. Yelverton*, 1864-5 (4 Macq., 747.)

The facts and principles involved in those cases are as follow:—

The Queen v. Millis.—In January, 1829, George Millis, a member of the United Church of England and Ireland, married

one Esther Graham at the house of the Rev. John Johnstone of Banbridge, County Down. Mr. Johnstone, being at that time, the regularly placed Minister of the congregation of Protestant Dissenters, commonly called Presbyterians, performed a religious ceremony of marriage according to the usual forms of the Presbyterians, and thereby George Millis and Esther Graham entered into a marriage contract, and cohabited as man and wife. In December, 1836, Millis again married Jane Kennedy at Stoke, in Devonshire, according to the form of the Established Church, by a priest in holy orders, the officiating minister of the said parish. In September, 1841, Millis was taken into custody at Belfast on the charge of bigamy and subsequently tried, the jury finding a special verdict in accordance with the above facts and the court reserving a point for the consideration of the judges as to whether the first contract thus entered into was sufficiently a marriage to support an indictment against Millis for bigamy. Upon the argument which took place before the Court of Queen's Bench (Ireland) the judges were equally divided in opinion; but one of the judges, with a view to the case being brought before the House of Lords, gave judgment *pro forma* in favour of the prisoner.³ A writ of error to the House of Lords was thereupon brought by the Crown. The case was then argued at the bar of the House in the presence of the English learned judges of the Courts of Common Law. At the conclusion of the argument the Lord Chancellor Lyndhurst proposed to the judges certain queries for their solution. In reply thereto, the Lord Chief Justice Tindal delivered to the House of Lords an address which embodied the opinions of the judges on the law of this controverted case, and the House affirmed the judgment of the court below, the Irish Court of Queen's Bench. The votes of their lordships were equal:—Whether the judgment complained of should be reversed? Two peers were for reversing and two for affirming, whereupon, according to the rule: "*Semper praesumitur pro negante*," it was determined that the judgment of the Court below should be

affirmed. Consequently, their Lordships' decision was in favour of the prisoner Millis, that he could not be indicted for bigamy.

The principle which determined this question was, that the former Marriage had not received the benediction of a priest in Holy Orders : the judgment resting on the constitution of Archbishop Lanfranc, at a council held at Winchester in 1076. *Praeterea statutum est, ut nullus filiam suam, vel cognatam det alicui absque benedictione sacerdotali ; si aliter fecerit non ut legitimum conjugium, sed ut feneratorium judicabitur.* This canon declares that it is decreed, no one should give his daughter or kinswoman in marriage to any one whatever without the priest's benediction : other marriage should not be deemed lawful, but fornication. It was also decided that the contract *per verba de praesenti* was by the English law never held to be actual marriage.

Consequently, three enactments, resulting from their Lordships' Judgment, passed the Legislature. 1. The 5 and 6 Vict. c. 113, to render valid marriages heretofore solemnized by Presbyterian Ministers, excepting those declared invalid by any Court of competent jurisdiction. 2. The 6 and 7 Vict. c. 39, to render marriages celebrated in Ireland, before and after the passing of 5 and 6 Vict., c. 113, by Presbyterian or Dissenting Ministers, of the same force in law as solemnized by Clergymen of the Established Church. 3. The 7 and 8 Vict., c. 81, commonly called the Irish Marriage Act.

To Register Marriages in Ireland, this last Act distinguishes between Presbyterians and other Protestant denominations. Also, in its mode of regulation, Presbyterian marriages follow closely the analogy of the law relating to marriage by the Established Church. By the 4th section, marriages between parties, one or both of whom are Presbyterians, may be solemnized in Certified Presbyterian-houses. Those Acts, confirm marriages celebrated by Protestant Dissenting ministers in Ireland. An Act of the *Irish* Parliament 21 and 22 Geo. III, c. 25 had previously legalized marriages solemn-

nized by Protestant Dissenting ministers between Protestant Dissenters.

In *Beamish v. Beamish* the facts were as follow:—In 1831 the Rev. Samuel Swayne Beamish, a Clergyman in Holy Orders, in a private house in the City of Cork, performed a ceremony of marriage, agreeably to the Form of Marriage in the Book of Common Prayer, between himself and Isabella Frazer, the mother of the respondent in the case. It was averred that the said Rev. Samuel Swayne Beamish received the declaration from the said Isabella Frazer, that she took him, the officiating Clergyman, to be her wedded husband. Also, that he placed a ring on the forefinger of the said Isabella Frazer's hand,—that he pronounced the blessing in the form appointed by the marriage service,—that there was no other Clergyman or person present in the room where his marriage was solemnized; and that the only witness was a woman, outside the house, who saw the ceremony performed without hearing what passed between the parties. On these facts an action was brought—one of ejectment—to recover land by the respondent against the appellant, his Uncle, the validity of the respondent's title depending on his legal status, whether he was the legitimate son of Beamish. The Court of Queen's Bench (Ireland) held that the marriage was valid. On error to the Exchequer Chamber, six judges, (namely, Chief Justice Lefroy, Chief Baron Piggott, Justices Crampton, Perrin, Moore, and Baron Richards) held that the marriage was valid; and five (namely, Chief Justice Monahan, Justices Ball, Jackson, Keogh, and Baron Greene) that it was not. The case was argued at the bar of the House of Lords, and the learned judges were summoned to attend the arguments. When concluded, the question was put to the judges, whether upon the facts found by the special verdict the plaintiff, Henry Albert Beamish, was the legitimate son of the defendant? In answer to this, the late Justice Willis delivered an elaborate and unanimous opinion in the negative as expressed by all the judges, which the

then Lord Chancellor Campbell declared to be a repertory of all the learning to be found on the subject. Their lordships thereupon reversed the decision of the Court below, and treated the marriage as invalid.

The law of the case was accordingly declared that there never could have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or deacon. And where the bridegroom was himself a priest, and there being no other priest present, a valid marriage could not be contracted by his sole ministerial agency. The law requires that equally in the case of the clergy as of the laity; marriage in this country must, in the absence of express statute, take place in the presence and with the assent of a clerk in Holy Orders, who must be a third person, and whose duty it is to defer or prevent the marriage if there be a just impediment ascertained; and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife.

According to Littleton, marriage is *knot* for civil purposes after affiance and troth plighted between them. It was also declared in this judicial decision that the ceremonies enjoined by the Rubric, such as addressing the congregation, putting the ring on the finger, pronouncing the benediction, &c., are not absolutely essential to the validity of a marriage *in facie ecclesiæ*; the essential part being the reciprocal taking of each other for wedded wife, and wedded husband, and their being declared married persons.

The case of *Yelverton v. Yelverton* is one of the greatest blots upon our jurisprudence in matrimonial proceedings of modern times. It serves to illustrate the consequences to which the contradiction and conglomeration of the Marriage Laws of the United Kingdom, not only *may* but *actually* give rise. The facts are these: Major Yelverton married a lady named Miss Longworth, first in Scotland, and next in Ireland; and then forgetful of his honour as well as his vows,

he married subsequently another lady, by whom he had an offspring. As to the first marriage with Miss Longworth, in 1857, the parties to that suit went through a ceremony in Scotland, which, in the opinion of the Court of Session, constituted a valid marriage; and afterwards, the same parties went through another ceremony in Ireland, which in the opinion of the Irish Court of Queen's Bench constituted a valid marriage. But on appeal to the House of Lords, the judgments of both the Courts below were reversed, and both the Scotch and Irish ceremonies were declared null and void. Considerable and weighty conflict of opinion prevailed among the eminent legal members of the Appellate Court of the House on this important and serious case. Two of the members of that august assembly—and the most eminent jurists this age has presented in the forum of English Justice—namely, ex-Lord Chancellor Brougham, and the then Lord Chancellor Westbury, gave their decision in favour of the Yelverton marriage in Scotland, if not in Ireland: for by a monstrous Irish law, 19 Geo. II., c. 13, the aggrieved lady being of the Roman Catholic persuasion, every marriage celebrated by a Popish priest between two Protestants, or between a Papist and any person who hath been, or hath professed him or herself to be a Protestant at any time within twelve months, which Major Yelverton had done, before such celebration of marriage, is declared to be absolutely null and void to all intents and purposes; and by two other Acts of the same reign such a celebration of marriage is made capital felony.

Such a conflict of legal opinion, on the part of most eminent jurists, led immediately after the verdict, or rather decision in the Yelverton case, in 1865, to the issue of a Royal Commission; whereby a public inquiry was instituted, whether the marriage laws in the *three* parts of the kingdom could not be assimilated?

The Commissioners, of whom Lord Chelmsford was chairman, consisted also of the present Lord Chancellor, the late Lord Chancellor of Ireland, Lord Selborne, Lord Hatherley,

Lord Penzance, Lord Mayo, Lord Lyveden, the Lord Justice General of Scotland, Mr. Monsell, Mr. Walpole, and Mr. Dunlop. They commenced their inquiries by issuing a circular letter to the ecclesiastical authorities of all persuasions, and received a very general response. They also examined learned witnesses, and extended their inquiries over three years. A report was prepared by Lord Selborne, which was generally signed: two Roman Catholic Commissioners, Lord O'Hagan and Mr. Monsell, dissenting as to the recommendations concerning the law of divorce. According to their creed, the marriage tie is held as indissoluble, and divorce, *a vinculo*, as contrary to the law of God. The Lord Justice General of Scotland expressed his settled conviction, founded on experience, and a patient study of the subject, that the marriage law of Scotland is preferable in theory and principle to the marriage law of England, as being exempt from harassing doubts, as to the validity of regular marriage in *facie ecclesiæ* in Scotland; thus preserving the security of titles and the peace of families. The Commissioners recommended that the whole of the enactments of the marriage law should be embodied in a single statute, and that all the existing statutes of the United Kingdom, thus embracing Scotland and Ireland, should be repealed.

Already mention has been made of the canon of Archbishop Lanfranc, in 1076: there is another utterly unsuited to a Protestant community, that of King Edmund in 945. It reads thus. "The mass priest shall be at the nuptials who shall, according to right, with God's blessing, celebrate their union (*i.e.*, of the contracting parties) with all solemnity."

The Commissioners also report, that great care should be taken, not to revive, by such repeal, any canon, or other law on the subject of marriage, which has been expressly or virtually repealed by former legislation.

It is now five years since the report of the Marriage Commission was presented to Parliament, and it must be a matter of regret, if not of reproach, that no action has been taken by the responsible advisers of the Crown. The ques-

tion now seriously attracts public attention, and probably, when dealt with, will be found through public sloth, not to be in such favourable circumstances for legislation as may be desired.

What the Commissioners aimed at was to give certainty to marriage, and reasonable time for the proper interested parties to prevent hasty and improvident marriages; and to reconcile the great and important principle of a civil contract with the sanction of religion. With this view the Commissioners proposed that, by enactment, every authorised minister of religion who is in the active exercise of official duty in his respective church or denomination, and who is, also, amenable to public responsibility as well as to the censure and discipline of his own religious community, should be rendered competent for civil purposes to solemnize marriage, and thus to perform the office of registrar, giving at the same time parties the option and right to be married by the ordinary registrar. The great object apparently of the Commissioners seemed to be to simplify the marriage laws of the three kingdoms, to make them uniform, to remove the cases of scandal and uncertainty which occurred so frequently in Scotland and Ireland, and utterly to sweep away that remnant of the sectarian system, by which the validity of marriage might be affected.

The Statute Book contains no less than twenty-seven Acts of Parliament relating to marriage in England, with their usual perplexing amendments, and partial repeal of other and parts of Acts. Nor are they confined exclusively to marriage; they deal with matters auxiliary thereto, but logically distinct. Let all these be repealed, and the marriage code simplified and consolidated. At the present time in England there are no less than eight modes by which parties can be married. 1. By the ceremonies of the Established Church after banns. 2. In the same mode after license. 3. In the same mode by the Superintendent Registrar's certificate. 4. By purely civil marriage before the Registrar. 5. By Nonconformists' ceremonies in the presence of the Civil

Registrar. 6. By Jews or Quakers' ceremonies without presence of the Civil Registrar, 7. Quakers, in the presence of their registering officer. 8. By Jews, in the presence of the secretary of a Jewish synagogue. In Ireland there are six modes of marriage. 1. By the rites of the dis-established church after banns. 2. In the same mode after license. 3. In the same mode under the authority of a Registrar's certificate. 4. By a Romish Priest. 5. By Presbyterians, 7 and 8 Vict. c. 81. 6. By the purely civil ceremony under a registrar's certificate. It is observable that it is compulsory on the Clergy in Ireland, and not optional, as it is in England, to solemnize marriage under the authority of a Registrar's Certificate. As to Roman Catholic Marriages prior to Mr. Monsell's Act 26 and 27 Vict. c. 90, they were left to the operation of the Common Law without any statutory enactment; and so far as relates to the legal constitution of marriage between such parties, this is still the case: the provisions of the Act being merely directory, with a view to the registration only of such marriages. The Act 36 Vict. c. 16, relates to any religious community, who are not Roman Catholics, and who do not describe themselves as Protestants, such as the Irvingites, as to the Registration of their places of public worship in Ireland for purposes of Marriage.

There are also six modes of securing marriage in Scotland. 1. By the Established Presbyterian Church of Scotland. 2. By the Episcopal Clergy. 3. By Ministers of all persuasions. 4. By *verba de præsenti*. 5. By *verbai subsequent copula*. 6. By habit and repute. 1. Before 10 Anne, c. 7, and 4 and 5 Will. IV. c. 28, the solemnization of marriage by any other than a minister of the Established Church of Scotland, was prohibited under severe penalties, and deemed clandestine and irregular. 2. By 10 Anne, c. 7., the first relaxation was in favour of Protestant Episcopal Clergymen duly ordained by Protestant Bishops. 3. By ministers of all persuasions. The Act 4 and 5 Will. IV. c. 28, extends the privileges accorded to the Episcopal Clergy to all other recognised ministers of religion; and the penalties imposed by the older

statutes upon the Celebration of Marriage in Scotland by Róman Catholic Priests or other ministers, not belonging to the Established Church were repealed, though even now the banns of parties of every denomination must be published in the parish Kirk. The three other modes by which marriages may be effected in Scotland. 4. *Per verba de præsenti*; the parties either with or without witness exchanging their mutual consent to be henceforth man and wife. 5. *Per verba subsequenti copula*; that is, where a promise of future marriage is made, and then cohabitation of the parties following; this is held to constitute a valid marriage, though there has never been a present contract. By the Judgment in the *Dalrymple* case and in the subsequent case of *McAdam* the House of Lords, *de præsenti*, in Scotland, was elevated to the position of marriage. Cohabitation need not be proved. But marriage *de futuro subsequenti copula*, must be proved by writing or oath of party. The latter cannot be required if it would invalidate a subsequent marriage. Also, it is controverted by high authorities whether such marriage is valid without being so pronounced by some high judicial sentence in the life-time of both parties. 6. By habit and repute, that is, where the parties have for a length of time lived together as man and wife, and have been generally reputed to be so.

In Scotland there is no provision for civil marriage; but divorce, *a vinculo*, is allowed.

Under the Act 19 and 20 Vict. c. 96, commonly called Lord Brougham's Act, it is necessary for the validity of any marriage contracted in Scotland, that one of the parties should either have his or her usual place of residence in Scotland at the date of the marriage, or have lived in Scotland for twenty-one days next preceding such marriage. Before this Statute, it was very common for English persons to contract clandestine marriages in Scotland, at Gretna Green, and other places, immediately after crossing the border; a practice which this Act has effectually suppressed.

Nevertheless, although an English man is prevented from

marrying one of his own country-women in Scotland for twenty-one days, unless she had domiciled so long in Scotland he may marry a Scotch woman the hour after he sets his foot in Scotland. A Scotchman may now run away with an English heiress, and immediately marry her irrevocably *per verba de præsenti*. Clandestine marriages in Scotland may, however, be registered either by the process prescribed by the Registration Act, 17 and 18 Vict. c. 80., or by Lord Brougham's Marriage Act, 19 and 20 Vict. c. 96, although the strictly penal Clandestine Marriage Acts, 1661, c. 34, and 1698, c. 4, are still unrepealed. In either case of Registration, an extract of the marriage from the Registrar's book, is received as evidence of the marriage without further proof, over all Her Majesty's dominions.

From this detail we discover that, contrary to public policy, there is an exceedingly undesirable want of uniformity as to the mode in which the marriage contract may be accomplished in the United Kingdom. As to Scotland, Lord Hailes, a great authority, declared in 1772, that the law of Scotland regarding marriage was derived from the rules of the Canon Law, as that law stood before the era of the Council of Trent. Thus, what was the law of all Europe, while Europe was barbarous, is now the law of Scotland only, when Europe has become civilized. The recommendation of the Commissioners is, as the conclusion of their reasonings upon this point of view, that the law of consensual marriage, and of marriage by promise *subsequente copulâ*, as it now exists in Scotland, ought not to continue. *

The conflict of the laws of marriage in the different kingdoms of this realm is fearful, and most disastrous in its results. The marriage law of each country is supreme within its own domain ; and a man or a woman, without the commission of an indictable offence, may be legally married at one and the same time to two persons, the law in one part of the kingdom regarding the first, and the law in the other part of the kingdom regarding the second marriage as valid, or the laws so contravening might subject parties to very

serious penalties. Hence the necessity of a sound, uniform marriage law for the United Kingdom, as simple and certain as possible, without too much interfering with what may be considered the *lex loci contractus*, or allow the marriage recognised as legal in one kingdom to prevail as legal through every other kingdom throughout the world.

In attempting to remedy the confusion of the marriage laws certain clerics are very clamorous in demanding conformity to the canon law as the *panacea*; against this, every one endowed with practical wisdom would protest. The enactments, or dicta of canonists, were framed for a state of semi-barbarism, when the clergy were the sources of civilization, and were able by their spiritual influence, to give considerable effect to the decrees they promulgated. But let it be remembered, as Lord Chief Justice Tindal stated to the House of Lords, in 1843, that the Canon Law of Europe does not, and never did, as a body of laws, form part of the law of England. This has been long settled and established law. Truly, we made Canons in Saxon times, and at the Conquest, in favour of priestly benediction being essential to a valid marriage; but it was our own Canon Law, independent of the See of Rome.

According to the ancient Canon Law, although marriage was regarded as a sacrament, no religious rites were, prior to the Council of Trent, deemed essential and indispensable to the celebration of matrimony. When the plea of espousals was interchanged between a man and a woman of physical, moral, and ecclesiastical capacity; the Sacrament was considered as having been received by both, and the indissolubility of their union could not be disputed. As truly, Lord Brougham averred in the House of Lords, "The Council of Trent was never received or acknowledged in England." Sanctius (*De Matrimonio*) affirms the validity of the nuptial contract without a priest, before the Council of Trent. As Lord Chancellor Campbell observed, in the case of *Beamish v. Beamish*, in the House of Lords: "So strongly was the maxim of Civil Law (*consensus non concubitus facit matri-*

monium”) understood to be the universal law in Christendom, that a large majority of the bishops, assembled in the Council of Trent, protested against the power of the church to alter it, and the old Canon Law is still in force in every Roman Catholic State wherein the decree of the Council of Trent has *not* been received. In the case of the *Queen v. Millis*, Lord Campbell likewise observed : “ The decree of the Council of Trent, respecting the solemnization of marriage, requires the presence of the parish priest, or some other priest specially appointed by him, or the bishop ; but even under this decree, the priest is present merely as a witness ; it is not that he should perform any religious service, or in any way join in the solemnity. This view of the subject is illustrated by the case of Lord and Lady Herbert.* The decrees of the Council of Trent were never received in Scotland, † no more than in England. The Canon law appears to be the basis of the matrimonial law of Scotland, according to Craig.‡ *Totam hanc questionem pendere a jure pontificio*. The decrees of this Council of Trent are now valid in Ireland among the Roman Catholics, who considered them published throughout the greater part of Ireland from time immemorial, except in the Roman Catholic communion in Dublin, Kildare, Ferns, Ossary, Meath, and Galway, where they had force of law on the 1st of January, 1828, quite modern. And, again, the decrees of the Council of Trent were never admitted as of authority in France. The Ordinance of Blois, art. 44 ; the edict of Henry IV. of 1606 ; and the declaration of Louis VIII. 1639, art. 1, constituted the marriage law of that kingdom before the Revolution.§ Nevertheless, the decrees of the Council of Trent are the laws in several countries of Europe at the present day.|| Solemnization of marriage was *not* used in church before the Ordinance of Pope Innocent the Third, who

* 3 PHILL. 58. 2 Hagg. Consist. Rep. 263.

† 2 Hagg. C. R. 82.

‡ Craig. lib. 2 dieg. 18, s. 17 ; 2 Hagg. Cons. R. 70.

§ 1 Burge on British Law, 175.

|| 2 Hagg. c. 4, 272 ; 3 Phill. R. 63, 64.

filled the Papal chair from 1198 to 1216, before which the man came to the house where the woman inhabited and carried her with him to his house, and this was all the ceremony.* As Protestants, we do *not* regard matrimony as a sacrament,† and the recorded marriage of Isaac and Rebekah, Gen. xxiv. 40-67, being without the detail of any religious ceremony whatever. We, therefore, must maintain that marriage for civil purposes is valid without any religious sanction; yet in a Christian country it is proper and salutary to add a religious service to receive a Divine blessing. At the same time, whilst we make some provision for civil marriages, as did the Code Napoleon, we need not require, as that code does, that all marriages antecedently shall be first contracted before the civil magistrate, by a purely civil ceremony of the simplest and shortest description, to render it valid marriage in the eye of the law; and then to receive a certificate from the Mayor or his deputy, at the Hotel de Ville or Maison Communale du arrondissement, before any Minister of Religion can perform a religious ceremony. Our Legislature need only be concerned with three primary considerations as the basis of a good code of matrimonial legislation. 1. That the matrimonial contract forming the basis of domestic life should be unequivocal, so that no persons should be able to entertain a doubt as to the validity of the contract into which they have entered. 2. That there should be *public* notice of this contract, so that any one endowed with a right to prevent it should have the best practical opportunity of doing so. 3. That the evidence of marriage should be at once secured, and preserved in the shape most readily available for future use, whether to establish legitimacy, or to prevent bigamy.

LICENSES FOR MARRIAGE.—Licenses or dispensations from banns were originally intended exclusively for the use of persons of noble and illustrious quality, but that it is

* Banting's case, Moore, 170; Vin. Abr. Marriage (F.) Bingham's Antiquities of the Church Book, 22, vol 7, 8vo. ed., 1829. pp. 208—277.

† 25th Article of the Church of England.

evident the usages of two centuries past, have extended them to the convenience of other classes of society. The privilege of a special license is still restricted to persons of condition, the children of nobility, Privy Councillors, Members of Parliament, Baronets, or Knights. The stamp duty by 55 Geo. III., c. 184 is £5. It provides for marriage "at other meet and convenient place than a church." It was first conferred by 25 Hen. VIII., c. 21, then 4 Geo. IV., c. 76, sec. 20, and then by 6 and 7 Will. IV., c. 85, s. 1.

BANNS OF MARRIAGE.—Banns are of great antiquity. They were universal in the Western church, and seem to have originated in the Primitive church, of which usage traces may be found as early as the time of Tertullian, and even of Ignatius. Now it is becoming for the married, and for those to be married, to ratify their union, that the marriage may be solemnised, as in the presence of God, and not according to concupiscence.* *Unde sufficiam ad enarrandam felicitatem ejus matrimonii, quod ecclesia conciliat et confirmatoblatio, et obsignat benedictio.*† Whence it may suffice for explaining the happiness of the marriage state, because the Church unites, the offering establishes, and the blessing seals. The canons enjoining thrice repeated publication of banns were made in England in the reign of King John 1200, of Edward II. and Edward III., 1322 and 1328; and on the two last occasions reference is made to the decree of the Council of Lateran, held 1216, inflicting the punishment of three years' suspension from office on priests who should officiate or be present at marriages where banns had not been duly asked.

So the canon of Archbishop Simon Mepham, Archbishop of Canterbury, made at a Synod in St. Paul's, London in 1328, in the third year of the reign of Edward III, mentions the perils arising from irregular marriages requires the suffragans to prevent them, and adopts the canon of the Council of

* Ignatius and Polycarp.

† Tertull ad Uxor, lib. 11, cap 2.

Lateran, inflicting on the clergyman celebrating a clandestine marriage, the punishment of suspension for three years. At the reformation, the Rubric in both the Books of King Edward VI, and that of Queen Elizabeth, required the publication of banns on three separate Sundays, or Holydays, in the service time, when the congregation was present. By the 62 canon of the church of England 1603 and 4, the celebration of marriage without a faculty or licence, except the due publication of banns for three several Sundays, subjected the minister to suspension per triennium *ipso facto*; thereby declaring merely what was the ancient and established law of the Church. As three years suspension for some clergymen had no terror an Act was passed in 1753, which made such an offence felony, and punished it by transportation for fourteen years. This Act was in this and most other of its provisions very closely followed by the Act 4 Geo. IV. c. 76, which now regulates marriages in the Church of England. In the final Revision of the Prayer Book in 1662 a special form of words was appointed to be used by the minister in the publication of banns. The rubric prefixed to the office of matrimony directs that this publication of banns shall take place in the time of divine service immediately after the second lesson. In Ireland it always takes place during the morning service, after the Nicene Creed. Some great judicial authorities hold that in England by the Act 26 Geo. II. c. 33, and by necessary consequence the Act 4 Geo. IV. c. 76 the publication of banns in our Churches, must take place after the second lesson.

Marriage by banns is, however, unsatisfactory. It is a matter of the gravest importance, because a very large proportion, about 62 per cent., of the whole number of marriages in England and Wales, are celebrated by banns. They are increasing every year; and the Registrar General declares that the present system of publication of banns affords facilities for clandestine and illegal marriages. Whoever has attended Manchester Cathedral, or any other Parish Church of a densely populated locality, will be ready to assent

to the truth of this statement. The Marriage Law Commissioners distinctly pronounce against the farce. In populous places no really valuable publicity is obtained by banns, which afford no safeguard against improvidence, illegality, or fraud. And frequently, from their very great number they furnish an inconvenient and unseemly interruption to Divine Service. Lord Eldon observed, it has been uniformly said, especially as to marriages in London, that the clergyman cannot possibly ascertain where the parties are resident; but this is an objection which a court before which the consideration of it may come, cannot hear.* But what is the answer of the Marriage Law Commissioners? Although banns are intended as a security against clandestine marriages, the law has given the clergyman no express power to call for or compel any information, as to the age, kindred, history, or other circumstances of parties unknown to him; except that he may, if he thinks fit, require from them seven days' notice with a statement of their names, and places of abode, within the chapelry, and length of residence in such places of abode. No legal penalties, however, are incurred by the false statement even of any of these particulars. Many also procure their banns to be published in populous places where they do not usually live, and are not personally known, and where the clergy have neither the leisure to seek nor the means of obtaining accurate information concerning them.

The Commissioners conclude that although publication of banns may be had, when required, that they should not henceforth be required by law as a condition either of the lawfulness or the regularity of marriage. Every useful purpose which can be answered by the publication of banns may be equally answered by the mere fact of notice to the officiating minister; only arm him with a power, which the Superintendent Registrar enjoys of exacting a *true* declaration, accompanying with the penalties of perjury every false

and fraudulent declaration so made. This would, in every probability, provide some-check against the contraction of illegal marriages, and the statutory requirement of banns throughout the United Kingdom may be abolished without any public disadvantage.

Should licences be continued, every clergyman having care of souls should be made a surrogate, and have power to grant a licence for marriage for the same price as is paid for the publication of banns. If it be right that the rich may be married by licence, the same privilege ought to be brought within the reach of the poor. "Marriage is honourable to all:" and God's blessing is not to be purchased by filthy lucre.

In England, prior to the year 1753, 26 Geo. III. c. 13, the date of Lord Hardwicke's Act, there were three modes of celebrating marriages in England: 1. Those in *facie Ecclesiæ*, either by licence or banns. 2. Clandestine marriages by clergymen episcopally ordained. The *non fieri debet, factum valet* doctrine being Church Law, the May-fair and Fleet prison marriages were valid. Then a marriage, even in a church without banns or licence, was as valid as with; for, although they were requisite, fit, or proper to be complied with, yet they were *not* necessary to the validity of a marriage.* A regular trade in clandestine marriages was then carried on by degraded clergymen of infamous character, the inmates of prisons—persons indifferent to all social and ecclesiastical restraints. 3. There were consensual marriages, *sponsalia de presenti*, or *sponsalia de futuro*, before explained.

Now there was always this difference; that the first and second kinds of marriages were good *ab initio*: the latter only *potentially* good. If A contracted a consensual marriage with B and afterwards a marriage *in facie ecclesiæ*, or a clandestine marriage with C, the temporal courts would recognize the second, and not the first. But if B, went to the Ecclesiastical Courts when a prior contract of marriage

* *Wright v. Ellwood*, 1 Curteis 58; *Reg. Abr. c. Marriage*.

was proved, the Spiritual Court would compel the affianced party to solemnize the consensual marriage in the *Church*; the temporal courts would then repudiate the second, and admit the first marriage.*

Lord Hardwicke's Act (26 Geo. III., c. 33) abolished clandestine and consensual marriages; and insisted on all marriages, Jews and Quakers excepted, to be solemnized in the Established Church. This statute was stigmatized by Mr. Fox, in his celebrated speech, as "tyrannical, unjustifiable, oppressive, and ridiculous;" and by Sir James Mackintosh, as "more like a measure of the grandees of Castile made to protect their moral and physical imbecility from the admixture of plebeian blood, than a measure in character with the mild and unoppressive dignity of English nobility." For eighty years the battle on this Act continued; and not without difficulty was it repealed in 1823. In 1836, the 6 and 7 William IV., c. 85, the Registration Act was passed, and civil marriages became legal in this country.

Lord Hardwicke's Act abolished pre-contract marriages. A pre-contract marriage, *per verba de præsenti* or *per verba de futuro*, was a marriage by the civil law, and the canon law of Europe. The English law had been partially changed in England by 32 Henry VIII. c. 38; was restored by 2 and 3 Edward VI. c. 23, and abolished by Lord Hardwicke's Act; and when this Act was repealed by George IV. c. 76, it was re-enacted by the 27th clause: That in no case whatsoever shall any suit or proceedings be had in any ecclesiastical court, in order to compel a celebration of any marriage in *facie ecclesiæ*, by reason of any contract of marriage whatever, whether *per verba de præsenti*, or *per verba de futuro*, any law or usage to the contrary notwithstanding. In Ireland as to this state of law, a contract *per verba de præsenti* was first modified by 12 George I. c. 3, s. 6 and 7, afterwards abolished by 58 George III. c. 81. In Scotland such marriages are valid, but with this difference as to that which was once valid

* *Baxter v. Buckley*, 1 Lee's R. 42. Oughton, tit. 209 et seq.

in England, that it is legally binding from the beginning, and not merely after regular solemnization enforced by process in the spiritual courts. In Scotland a clandestine marriage is simply a marriage without banns. Non-compliance with the legal condition of regular marriage, as to banns or otherwise, may subject the parties to statutory penalties, but cannot affect the validity of the interchange as constituting marriage, the utmost effect of such non-compliance being to make the marriage irregular.

Lord Russell's Act, in 1834 (4 and 5 William IV. c. 28) enabled marriages to be solemnized by Roman Catholic priests or other ministers (not belonging to the Established Church of Scotland). It is not necessary in Scotland that marriages should be solemnized in any particular form, or at any particular place or time. The presence of any minister of religion at the time of solemnization, except Quakers and Jews, before their proper officers, entitles the contract to the character of marriage. The question of mutual acceptance must be solemnly put, and an answer required, as in the Roman *stipulatio*, and there must be a declaration made by the clergyman that the parties are married. Except in the cases of Roman Catholics and Protestant Episcopians, the general practice is to marry in their churches and chapels; those marriages are, in fact, usually solemnized in private houses, and indiscriminately at all hours of the day.

No provision is made by the Scottish Registration Acts for enabling the Civil Registrar to give the character of a regular marriage to any contract of marriage entered into in his presence without any religious ceremony; nor is the presence of a Civil Registrar required at any regular marriage, though his attendance, if the parties desire it, may be secured, on payment of twenty shillings. There should not only be a power, but a compulsion of a registration of *all* marriages in Scotland. As to *Roman Catholic marriages in Ireland*, they may be as hasty and clandestine as any which formerly took place at the Fleet or Gretna Green; nothing but the priest being necessary. Mr. Monsell's Act (26 and

27 Vict. c. 90) is only directory, with a view to the registration only of such marriages.

The registration of such marriages should be as obligatory upon Roman Catholic priests as on anybody else. The small expense for Registrars the nation would cheerfully contribute; and, therefore, the expressed concern for the national exchequer, and the abhorrence of centralization on the part of the Roman Catholic clergy, must give place to a compulsory record of marriages in the Romish community in Ireland. Make the Romish priest, in every instance of the marriage of Roman Catholics, the Registrar of Marriage. He should keep duplicates of registers of marriages furnished for him by the Registrar-General, making the *priest* and *not* the *husband* of the marriage the party to communicate with the Registrar-General.

All this confusion of the Marriage Laws is worse confounded, when we consider that a lawful heir in Scotland is not necessarily an heir of land in England. That was decided by the House of Lords; but more especially by the differences in the Law of Divorce as administered in the three kingdoms severally.

An Irish marriage can only be dissolved by Act of Parliament unless the parties have an English or a Scotch domicile. The Act constituting the Divorce Court (20- and 21 Vict. c. 85) being confined to England.

Again, what are grounds for divorce in Scotland are no grounds for it in Ireland or England; and these grounds and the proper procedure to be based upon them are settled for England by statutes, which do not extend to Scotland or Ireland.

There is a conflict of the Law of Divorce in the separate kingdoms of Great Britain or Ireland. The House of Lords may be compelled on appeal to hold a marriage bigamous in England or Ireland, to be lawful in Scotland. Such a conflict should be removed by legislative enactment. And the legal effect and validity of a sentence of dissolution of marriage pronounced in a *bona fide* suit by a Court having proper

jurisdiction over the parties and cause, ought to be the same throughout the United Kingdom.

There is in Scotland a prohibition of the intermarriage of persons declared, by the sentence of a Divorce Court, to have been guilty of adultery together. The Commissioners conclude that this prohibition ought not to continue. The Legislature declined to introduce any similar prohibition when the present divorce law was established in England. As it now exists in Scotland, it is one of an arbitrary nature, depending on the terms of the sentence, not on the mere fact of adultery. It is a settled point in the law of Scotland, that a sentence of dissolution of marriage, on proof of facts sufficient to constitute divorce by the Scotch law, which admits of more latitude in this respect than the law of England, may be competently pronounced by a Scotch Court between persons having their legal and matrimonial domicile in England, or any other country. Thus English persons may temporarily resort to Scotland to obtain such divorce, without intending to domicile permanently in that country. It is still an unsettled point in English Courts whether such divorce would be recognised without a legal domicile in Scotland. Limits of residence, upon the jurisdiction of such Court, should be well ascertained; and no facilities granted for divorce except those recognized by the laws or customs of the country. As the late Sir James Graham, Bart., said at the passing of the 19 and 20 Vict., c. 96, there should be no needless interference with marriage customs, except to secure legality of marriage.

Certainly any clergyman, whose conscience does not forbid him to solemnize a marriage of divorced persons, perhaps the only possible reparation of evils past and irremediable, should be exempt from all ecclesiastical penalties; and a Bishop withdrawing or refusing such a license on such grounds should be rendered amenable to a law which requires justice to be administered, without any infliction of censure or loss, for simply discharging a legal duty in favour of fallen persons.

The Marriage Commissioners recommended that throughout the three kingdoms notices, such as are now given to the Registrars under the Registration Act, should be substituted for banns and licenses, that all ministers of religion of whatever denomination should be entrusted with the powers now exercised by Registrars; that they should be able to receive and publish notices of marriage, to celebrate marriages, to register them, and grant the usual certificates. They also proposed that marriages should be allowed to be solemnized in any place and at any time. When notice of marriage should be given to a minister of religion, it should be accompanied by a declaration, which, if false, would entail the penalty of misdemeanour. In every case a copy of the notice should be forwarded to the Superintendent Registrar the next post after being received, to be inserted by him in his notice book, kept by him for such purpose. A copy of such insertions should be sent quarterly to the Registrar General. No minister of religion should arbitrarily refuse to record such notice, or to grant the necessary certificate after the expiration of fifteen days, without being liable to a fine of 40 shillings for every day's neglect, recoverable in a magistrate's court, but should the minister to whom a party should signify intention of marriage, know of any legal impediment, and disregard it, he should be subject to a penalty, either of a fine of £10 or two months' imprisonment, at the magistrate's discretion. If parties are not personally known to the dispenser of certificates, fifteen days should intervene before a certificate of compliance with preliminaries should be issued; but, whenever granted, a copy should be sent by the next post to the Superintendent Registrar, or *vice versa* to the incumbent of the parish, or other minister of religion. A certificate by a clergyman, incumbent of a parish wherein one of the parties resides, might give authority to be married in any other church; but notice should, by the next post, be sent to the minister of that parish. The time for which such certificate should be available, should extend to three months, to be computed.

from the date of the certificate. Such certificates would supersede all licences and banns; the latter now seems to aid, or supply facilities for clandestine marriages, as the published list at Manchester, Leeds, and Greenwich would seem to indicate. In no case, henceforth, should banns be a statutory requirement, but quite optional to the parties contracting marriage. If published in the church it should be, as at present, after the second Lesson of morning or evening service.

All preliminary requirements should be regarded as directory, and none of them as essential to the validity of marriage, or in any wise to invalidate them. The following conditions should be observed: 1. If the party to be married be either of them a widower or widow, the time of demise, either of the deceased husband or wife, should be specified in the notice. 2. A statement of any relationship, and what, subsisting between the affianced party; or, to the deceased wife or husband. 3. When residence first commenced in parish, or Registrar's district, and where residing, and how long prior to the said notice. 4. If either party be a minor, then the consent in writing of the parent or guardian; if their consent be not forthcoming, *their address*. And no certificate should be granted, unless the consent or refusal be recorded. The parents or guardians should be obliged to do one or the other under the penalty of a misdemeanour. 5. If both parties do not give notice to the same minister or officer, to whom, at what place, and when, is the notice of the other party given. The declaration should be made, and subscribed by one or both of the parties themselves, and supported by the testimony of two other credible persons, before any Justice of the Peace, authorized and accredited minister of religion, or civil registrar. A false declaration should be regarded as a misdemeanour.

The State having the absolute right to ascertain that the marriage is duly registered, should have the power to punish all persons making any wilfully false and material misstatements in the declaration, and the guilty parties should be

rendered liable to the penalties of perjury. But should any minister, civil officer, or other person wilfully contravene the provisions of the marriage law, his offence henceforth should be a misdemeanour; the penalties of felony for such an offence being repealed. A Roman Catholic bishop or priest should be sanctioned to celebrate mixed marriages if he pleased; but nevertheless he should be subject to the same rules with regard to time, place, notice, and registration, to which ministers of all other denominations are compelled to yield compliance. Every clergyman or minister should in no wise be relieved from the obligation imposed on him by the law or discipline of his own communion, as to time and place; the State should have nothing to do with these circumstances, canonical hours, as to the time for celebrating the mass, have nothing to do with the authentication of the contract of marriage. As to the place, let the religious freedom of the conscience of the married pair determine this question. No stamp duties on certificates, notices, or other documents should be imposed, consequently the present duties should be abolished. All fees and compulsory payments of every kind for the fulfilment of any preliminary condition, should be abolished. If any fees should be required to supplement the miserable incomes of the parochial clergy, there should be a moderate uniform scale settled by law. Wheresoever practical, marriage fees should cease to be exacted. All postage in compliance with the law of marriage should be free; and any increase to the expenditure of the nation would confer a corresponding increased public benefit.

The morals and welfare of society, being involved in marriage life, the ceremony of marriage becomes more lastingly impressive, when the offices of religion, particularly of the respective religious community of the married parties, are introduced by way of sanction, and moral enforcement. And more especially when Christianity guards the nuptial bond; and the Supreme Lawgiver enjoins fidelity in the words *He* has engraven on every man's conscience:—

“Thou shalt not commit adultery.”

As to its solemnization, Puffendorf avers: "according to the opinion of the Jews, consent alone rendered a marriage valid,"* and Grotius observes, "that no proceeding was made in the nuptial affairs till the solemnity had been ushered in by the hearing of Divine service in a public assembly."† A diversity of systems of marriage, which now obtains in the three kingdoms, is fraught with evil; for in one kingdom, the most important contract of all social relations formed, in another is neutralized by the glorious uncertainty of the Law. "*Indignum est in ea civitate, quæ legibus teneatur, discedi a legibus.*"

After so much exposure as is contained in the Report of the diverse and uncertain operation of the existing Marriage Laws in the United Kingdom, the first duty of the Legislature should be to sweep away this heterogeneous congeries, and enact a general law of marriage, embracing the peculiarities of each and all for the United Kingdom, to secure the legitimacy and peace of families, and to maintain the rights and preserve the property of the married pair.

In all parts of Great Britain and Ireland marriage is contemplated in the same point of view as a contract inducing a civil status, conferring the same rights and entailing the same obligations upon the persons entering into it. Nevertheless, the general feeling of the United Kingdom is in favour of superadding to this important contract the sanction of religion. Public attention seems also to be unmistakably directed to the desirableness of uniformity in the marriage laws of the United Kingdom. These views the Commissioners endorse, and although some of the evidence given at the sittings are less favourable than others to the employment of clerical agency, they are, notwithstanding, strongly impressed with the conviction that it would be better not to interfere with the general sentiments and habits of the people. In accordance with these opinions the Commissioners recom-

* Book vi., c. 1, s. 14, De Incest et Inutil Nuptiis, Dén. xxii, 23, 24.

† Grotius, ad Matt., 118.

mend a code of laws for the United Kingdom, both simplifying and consolidating; and it is hoped that such a measure will at once be laid before Parliament, to place on a satisfactory footing the present grievous condition of the laws regulating the union of man and wife.

Lex est ratio summa, insita in natura, quæ jubet ea, quæ facienda sunt prohibetque contraria.

IV.—RAILWAY ACCIDENTS AND THE RAILWAY COMMISSIONERS.*

IN our March number we published an article upon the "Regulation of Railways' Act, 1873," and while we admitted the importance of the interests which it was the object of the Legislature to protect, while we pointed out the excellent character of several of the provisions of the Act, we expressed our opinion that the Railway Commissioners would not have a great deal of work to do. So far as we know there has been no pressure of business at the West Front Committee Rooms, House of Lords, but we have on our desk before us two works which are intended to be of use to the public and the legal profession, in proceedings before this new tribunal, and it must have been the opinion of the authors of these works, that the Railway and Canal Traffic Act of 1873 was not likely to be a dead letter, otherwise they would not have taken the trouble to compile and publish these books. One or two words about them. Mr. Lely's has a fault of arrangement and a fault of typography. He makes a chapter of an abstract of the Report of the Joint

* "The Regulations of Railways' Act, 1873," by J. M. Lely, Esq., of the Inner Temple, Barrister-at-Law, London, 1873. "The Practice before the Railway Commissioners," by R. Gordon Junner, Esq., of the Middle Temple, Barrister-at-Law, London, 1874.

Select Committee on Amalgamation, of 1872, and as the Regulation of Railways' Act, 1873, was founded upon that Report the abstract will be useful. It ought, however, to have appeared as an appendix, instead of a chapter, and even if it did appear as a chapter, it ought not to have been placed between the text of the Act, and the General Orders of the Commissioners, which have been made in pursuance of its provisions. Again, Mr. Lely has thought it expedient to print the clauses of the applied Acts along with the text of the Regulations of Railways' Act, 1873, and as this saves distant reference it is calculated to be of use, but its utility would have been much enhanced had these portions of the applied Acts been printed in a different type from the sections of the act which applies them. As it is, one stumbles about in one's search, from section 6 of one Act to section 2 of another, and from section 2 to section 16 of a third. Had there been different types to guide the eye, time and trouble would have been saved to those of Mr. Lely's readers who may have occasion to use his work as a book of reference. Still the book is useful. He does not weigh the cases decided in the Court of Common Pleas and the Court of Session, but he marshals them with intelligence, and some of the notes to the Act contain a good deal of information. Mr. Junner's book is entitled "The Practice before the Railway Commissioners," but in its general construction and scope it very much resembles Mr. Lely's work. It contains, however, the judgments in the two cases which have been decided by the Commissioners, and is much more full in regard to the rights of passengers, to the receiving and forwarding of traffic, stational arrangements and parcels, than the last mentioned work, although we are not certain that all the law Mr. Junner's book contains really belongs to the jurisdiction of the Railway Commissioners. We fail to see what they have to do with questions under the Carriers Act, as to the amount of luggage a man may carry, as to the question what constitutes personal luggage, as to the measure of

damages for the loss of goods, and twenty other subjects of which Mr. Junner learnedly treats. Still this book has its merits, and we have such a thorough mistrust of railway companies, such a deep-rooted conviction that the exercise of their monopoly is calculated to do much harm to the public, that we hope that the business before the Railway Commissioners may be so great that both these books may come to early second editions. In neither of these works do we find much elucidation of the Act of 1873, and both authors seem to think its provisions are so clear that he who runs may read. We, however, entertain a somewhat different opinion, an opinion which induces us to believe that the writer of an article on "The Power of the Board of Trade in Relation to the Prevention of Railway Accidents," which appeared in the *Solicitors' Journal and Reporter*, of the 28th of March last, is wrong when he asserts that the Board of Trade is "the only tribunal which has at present any jurisdiction in such matters." We agree with him, however, in his conclusion that "when once a railway is opened the powers of the Board of Trade appear to be wholly insufficient for the protection of those who travel by it (the railway), for although they may authorise inspections of the line, buildings, and carriages, there is no provision for compelling the Company to repair any defects therein." Now it appears to us, after a somewhat careful reading of the Regulation of Railways Act, 1873, that there is a tribunal which has some jurisdiction as to Railway Accidents, and that that tribunal is the Railway Commission. It is true that the Court of Common Pleas did not so construe the Railway and Canal Traffic Act, of 1854, but we contend that in many particulars their constructions were narrow and erroneous, and that the very unwillingness which the Courts of Common Law shewed to have anything to do with what they called such "anomalous" jurisdiction, is an indication that they were right when they confessed their utter inability to carry that Act judiciously into effect. The words of the Statute are that every Railway Company "shall according to

their respective powers afford all reasonable facilities for the receiving, forwarding, and delivering of traffic, &c." (Section 2 of the Act of 1854, and section 11 of the Act of 1873). The term traffic is said by the Act (section 3) to include passengers and their luggage. Now can it be said that a Railway Company is giving due facilities for the receiving, forwarding, and delivering of traffic, if it conducts its traffic in such a way as to cause an accident, if its permanent way or rolling stock is in such a condition that an accident must necessarily occur? Is it a due facility to a passenger to deliver him dead? And if it can be proved that the arrangements of the Company are of such a nature as, in all probability, to cause an accident and that accidents do happen, is it not a contravention of the Act, and is it not a matter peremptorily calling for the interference of the Railway Commissioners? It appears from all the literature of the subject that this tribunal was created for the protection of the interest of the public, which were jeopardised by the crushing monopoly of Railway Companies. Are not safety of life and limb sufficient interest to call for protection? And does not the fact that the ordinary Common Law remedies of action for personal injuries in case of careless damage done by a Railway Company, or under Lord Campbell's Act in case such carelessness results in death, are not sufficient to deter Railway Companies from breaking limbs, or from neglecting the proper precautions for the security of life, prove that this was exactly one of those cases contemplated by the Act, a case in which no remedy existed, or in which only an inadequate remedy was at the disposal of the public? It may, perhaps, be objected to this reading of the Act that the term "facilities" really means only "little furtherances," and that to say that if a railway company kills a person it is not affording him due facilities, is to abuse language, and to force words to bear meanings which do not belong to them. But we would submit that just as the greater includes the less so the predication of the less in many cases takes for granted the greater. If a man

stipulates for a little furtherance he may be supposed to stipulate that no great obstacle will be placed in his way. And our reading of the Act induces us to believe that the intention of the Legislature was to compel Railway Companies to give all those uncovenanted mercies which were found so necessary for public convenience and safety, and when it mentioned the little furtherances it must have been taken to mean the great also. But can the public have the little furtherances of convenience (and the Court of Common Pleas interfered to make a junction station more comfortable for people waiting there) without safety? Are not safety and convenience inextricably associated, and in compelling the latter would not the Railway Commissioners be compelling the former also? Does not the fact that an accident happens from carelessness or from wearing out of the plant or rolling stock of a company prove that that company is not in a position to give due and reasonable facilities to the public? This is a matter which is urgent at the present time. Railway accidents are horribly frequent. The Board of Trade, by its Circular, has shown that it is aware of the fact, and yet, although the Board of Trade has a power to move in the matter under this very Act, has a power to appoint some one—say one of its railway inspectors—to apply to the Commissioners under the 6th section, and who may allege a contravention and violation of the Act in that passengers are not safely and securely carried; although the Board of Trade has this power, a power which if exercised would, we feel convinced, do much to put an end to railway accidents, they have not upon any one occasion exercised it. They maintain their policy of masterly inactivity except when they circularize Railway Companies and elicit sharp contradictions from angry chairmen. The public, however, is too anxious as to the comparative insecurity of railway travelling to put up with this long. But supposing our reading of the Act of 1873 is erroneous, there can be no doubt that legislation is called for. Would it not, in the event of the Government being forced to move

in this matter, be sufficient to do two things—1st, define facilities to include the safe and secure carrying of traffic, and, 2nd, to make it obligatory on the Board of Trade, in case of a contravention of the Act, to apply to the Railway Commissioners? These are slight changes but they would, we feel convinced, result in momentous consequences, in the safety of the public, in the security of human life, in overflowing work at the Railway Commission Rooms, and in the sale of these two works by Messrs. Lely and Junner.

V.—THE INNS OF COURT AND THEIR MONOPOLY.

NEATE V. DENMAN.

THE case of *Neate v. Denman*, recently decided by Vice-Chancellor Hall, is in truth more remarkable for its opportunity than its novelty. At a time when the training for the Bar, and the discipline to which it is or ought to be subject, are attracting a good deal of public attention, and are likely soon to occupy the legislature, it is a matter of much interest to know what is the constitution and government of the Inns of Court, their position in relation to the Courts of Law, the grounds on which they claim the monopoly of conferring the qualification of a barrister, the mode in which they exercise it, and the means by which they assert, so great a privilege.

The decision in the case referred to throws but little light directly on the two last mentioned questions, though of course the claim to such a monopoly, in the eyes at least of the Legislature, which may either allow or extinguish it, depends very much on the constitution of the bodies which claim it; but the Vice-Chancellor, acting only in the

capacity of a judge, refused, no doubt very properly, to consider any question except that of jurisdiction, until he was satisfied that he had jurisdiction; and he decided that he had not.

In order fully to understand the reasons of that decision and the extent to which it goes, we shall first see what were the circumstances of the case as brought before the Court.

Mr. Neate being sued at law upon his bar bond for arrears by the representatives of the surviving obligee of those to whom he had bound himself in the year 1832, filed his bill against the plaintiffs at law joining with them as defendant the present Treasurer of the Inn, offering to pay the amount demanded of him, upon having his bond delivered up to him, without signing the declaration invariably required by the Inn, as a condition of release from the bond, that the petitioner, as the person wishing to withdraw from the Inn is called, does not intend to practise as a barrister, either in the United Kingdom or the Colonies. Mr. Neate's objection to this declaration being that it was either unnecessary if continued membership of an Inn of Court was by law a necessary condition for practising at the bar; or if it were not so that such a declaration was against public policy as being in restraint of trade, or which is the same thing the exercise of a profession. Upon these grounds Mr. Neate prayed for the delivery up of the bond upon his payment of the arrears and the costs of the plaintiff at law, but exclusive of the further sum claimed by the Inn as a fine on composition or withdrawal.

To this bill the defendants put in a general demurrer for want of Equity, not expressly alleging the want of jurisdiction. -

The Vice-Chancellor, however, considering that the question of jurisdiction, whether raised or not by the pleading, was by the facts of the case brought under his judicial notice, refused to enter into the grounds of equity set up by the plaintiff, on the ground that he had no jurisdiction to interfere in any controversy such as this was between the Inn

and one of its members, the jurisdiction in such a case belonging exclusively to the Common Law judges, as the visitors of this and the other Inns of Court, in their character of private societies.

So far the judgment of Vice-Chancellor Hall would appear to be entirely justified, if not necessitated, by the previous decisions of higher tribunals, such as the Lord Chancellor in Equity and the Court of Queen's Bench at Law. But it was urged with some plausibility by the plaintiff in Equity that on one point the decision in this case went further than the others, for in the cases cited as excluding the jurisdiction, the first proceedings had always been taken by the individual member as plaintiff, whereas in this case, the Inn, though it was defendant in Equity, had in the first instance been plaintiff-at-law, and that as the Inn, or its representatives, had gone beyond the limits of their domestic forum to sue him at law, he had the same right against them, as he would have had against any other parties to set up an equitable defence. In another point, however, the Vice-Chancellor seemed disposed to recede from the extravagant length to which the exemption had been carried in the case of *Cunningham v. Webb*, 2 Bro. C.C. 241, in which the Lord Chancellor decided that he had no right to interfere in a question of contract as to the rent of chambers between the Inn and one of its members.

The question of jurisdiction in this case was raised by plea, which alleged the jurisdiction to be not in the judges alone, as the Queen's Bench have considered it to be, but in the Lord Chancellor and the Judges.

But even supposing that the case is questionable upon this ground, or had gone too far, as the Vice-Chancellor seemed to think it had, in excluding questions of "property," between the Inns of Court and their members from the cognizance of the ordinary tribunals, it still may be good law, and is not contrary to reason, that all questions of personal status arising out of the call of the bar, or upon the construction of the bond, which is a necessary preliminary to

that call, should belong in each case to the cognizance of the particular Inn, that is, to that of its governing body, subject to the control of the judges or visitors. The Courts have at any rate repeatedly decided that there is such a visitorial power in the judges, without defining what its limits are, and the judges themselves have in matters relating both of calls to the bar, or to exclusion from the bar, by compulsion from the Inn, or to election to the bench of any particular Inn, repeatedly exercised the power acknowledged to be in them.

Whether such a power can properly be called visitorial in the sense in which that word is used in reference to private foundations may be reasonably doubted. The power of a visitor in such cases is the right of jurisdiction or control belonging to the founder himself or transmitted or delegated by him to his heirs or nominees, of enforcing, or it may be of modifying the statutes or private laws by which the private body is both constituted and bound; but such a power supposes both an endowment and a corporate character, both of which are wanting in the case of the Inns of Court, and though these are possessed by means of a renewable trust of very considerable property the result of long accumulation which they would not think themselves at liberty to apply to their own private purposes, and are probably well aware that they would not be allowed to do so, they are careful to exclude, so far as they can, the right of the Attorney-General to interfere by information in the management of their affairs. Nor can we advise Mr. Neate to renew his single-handed contest with the Benchers in the character of a Relator.

There is indeed another sort of visitorial power or jurisdiction, so called by analogy, which is exercised by the Court of Queen's Bench over civil corporations, whether municipal or quasi municipal, like the Universities, or established for public purposes, like the Royal College of Physicians; but that jurisdiction is exercised by the Queen's Bench as a Court, and by the legal process of mandamus,

and it only attaches to the bodies which are subject to it by reason of their public character, which the Inns of Court have studiously disclaimed, and that with the sanction of the Queen's Bench.

Whether such a disclaimer has been properly allowed, as it has been, to the extent of giving the Inns of Court absolute discretion as to whom they should admit to membership as students, as was decided in the case of the King against the Benchers of Lincoln's Inn (4, Barn and Cres 853), is a point to which we shall presently revert. But let us first consider a little further what are the legal grounds, and what is the legal security of the privilege, which, whether they be private or public societies, they undoubtedly in fact possess, of designating or recommending exclusively to the judges, both of Law and Equity, those whom they shall admit to practice before them as barristers, and of determining the right so conferred, either by themselves or on their designation, by exclusion from the membership to which it was in its origin attached, for an exclusion or expulsion from an Inn of Court is what is meant by disbarring.

These privileges have existed for a long time by the allowance of the judges, both of Law and Equity, subject only to an appeal to the Common Law judges, as visitors, in the case either of a refusal to call to the bar or of subsequent expulsion. It is not easy to see why the judges of Courts of Equity should be excluded from all share in a jurisdiction, on the right use of which they have an equal interest with their brethren of the Common Law (and as we have noticed before the visitorial power was by the plea in *Cunningham v. Webb* claimed for the Lord Chancellor as well as the twelve judges), but perhaps what we shall presently see as to the origin or first creation of a barrister, and as to his having in the first instance altogether a Common Law character, may throw some light on the question.

A more important question than this is, whether the privileges itself of exclusively conferring the qualification of a barrister is a legal monopoly exempted from the Statute 21

Vict. 1, which the judges are bound to respect and to maintain; or is it one created by their delegation and liable to cease by their disallowance; or, to put the question into a more practical form, if the judges chose to allow any other qualification for practising in their respective courts, what remedy have the Inns of Court either in their collective character or as individual barristers?

Conveyancers in deeds and special pleaders have a certain protection given them by the Stamp Act, in the shape of a penalty against those who should draw legal instruments without being barristers or certificated special pleaders, but the object of the enactment in this matter was, as its place indicates, only the promotion of the Revenue, and the protection given to the barrister is confined to practice out of Court.

If, indeed, the Inns of Court were corporations either by charter or prescription, they might possibly make good their claim by prescription also to the *franchise* of qualifying for the bar, but they are even careful to disclaim all pretensions to continued legal personality, and are therefore incapable of holding property in their collective and aggregate but by no means coherent character, and a franchise is a form of property, so much so that when it affects the enjoyment or user of lands it is properly described as an incorporeal hereditament.

What we know of the origin of the outer barrister, as well as the *dicta* of judges which we shall quote, lead to the conclusion that the privilege of creating barristers was given to the Inns of Court in the first instance, and continues to exist by delegation, or more correctly speaking by sub-delegation from the judges.

The right to make barristers or privileged practitioners belonged in principle to the same power which made judges, that is to the Crown, as the *caput et fons justitiæ*. Accordingly we find that by an Ordinance of W. Ed. 1, John de Mettingham, Chief Justice of the Common Pleas, and his brother judges, are ordered to provide for every county a certain

number of attorneys and apprentices (the old name for a barrister) who were to have the privilege of following the court and taking part in the proceedings, and the ordinance suggests that 130 would probably be a sufficient number, without saying whether for all the counties, or each separately. (See Rolls of Parliament 2, 84, Dugdale Origines Juridicales, p. 146.) What the judges apparently did, and this according to Dugdale, is the origin of the Inns of Court, or at any rate the origin of their recognised status, was to commit to the Inns of Court the right of selection which had been delegated to themselves in the first instance by the Crown, or, more properly speaking, to use them as instruments of selection, and to accept as a rule their recommendation of persons as fit for admission to the Court; more than that they could not legally do, for "*Delegatus non potest Delegare.*"

It cannot be doubted at any rate, that the monopoly of the Inns of Court was at first precarious, depending wholly upon this continued confidence of the Judges, and it is not easy to show when or how it acquired a different character, the Inns of Court being, as before pointed out, precluded by the defect of this Constitution from claiming the benefit of prescription.

The Judges have, down to recent times, continued to speak of the Right as existing by their delegation, or rather sub-delegation, as we before pointed out. It was so described by Lord Mansfield in the Grays' Inn case referred to in 4 Barn. and Cres. 857, and the right of even an inferior court to confer upon Barristers the privilege of exclusive audience, as an incident to their power of regulating the practice of their courts, was established or declared in the recent case of *ex parte Evans* 9 Q.B. 279, when it was decided that justices in Quarter Sessions might give such exclusive audience, although the business of advocate had hitherto been performed by Attornies only, and Barristers had only attended on special retainer. The same principle, namely, that of the rights of the bar being a matter of regulation by the Courts, and not the subject of appeal to a higher jurisdiction, is laid down by Lord Chief Justice Tindal in the very important cases relating to the privileges of the Serjeants.* (8 Scott. 436).

This, the case of Serjeants, is one of special importance in other respects as showing what are the proper conditions of a legal monopoly of audience. It was decided that the Serjeants had such a right in the Court of Common Pleas, and the Royal Warrant, by which it had been attempted to set it aside, was recalled, and a compromise entered into with the Serjeants, by whom compensatory privileges in other Courts were accepted in lieu of the monopoly which they gave up in their own. But the right of the Serjeants stood upon a very different footing from that of the barrister or apprentice; they each of them took their seat within the Bar of the Common Pleas, in virtue of a separate patent, and in return for the privilege which that patent conferred they were subject to the obligation of attending the Court, the reason for their appointment having been, apparently, that it was the duty of the Crown to provide counsel for the private suitors, in the new court which it had established, or set apart specially for the trial of their suits, and in this way the monopoly of the Serjeants satisfied the only condition which can justify such a privilege, namely, the obligation of supplying the wants, or doing the work of the public.

Which of these grounds could an ordinary barrister set up against a warrant of the Crown, throwing open the practice of the Courts, say, for instance, to all who had taken a law degree at an University? It was probably some consciousness of the weakness of their title to a monopoly in this matter, that induced the Benchers of Lincoln's Inn to require as a condition for relieving a man from the obligation of his bond, the declaration objected to by Mr. Neate. But such a declaration is also important as establishing, or, at least, implying that continued membership of an Inn of Court, is a condition of the right to practice in any Court. This, indeed, is, under the present system the sole foundation of the right claimed and exercised by the Inns of Court, to exclude any barrister, being one of their members, from practising in any Court, by reason of his misconduct. Nor is there any other disciplinary power over the Bar, except that

which originates with the Inn to which each barrister belongs, for, though there is an appeal to the judges from the sentence of the Benchers, the judges never act in the first instance, except, of course, in matters affecting the order and decency of proceedings in their own court, and then only for the purpose of "immediate repression." In the present state of things, therefore, there is a great reason for the Inns claiming, in addition to the exclusive right of admission, that of imposing the condition of continued membership, though Mr. Neate might reasonably object to the extension of the Declaration to the Colonial Bars, as it will hardly be contended that the superintendence of the Inns of Court practically extends beyond the limits of Great Britain.

In a former part of this article we mentioned, as the subject of later reference, the absolute discretion claimed by the Inns of Court, and allowed by the Queen's Bench, of admitting only those whom they please to membership as students. Practically this discretionary power of excluding any one from all access to the profession, has not been so exercised as to be considered a grievance, and it has, of late years, at any rate, been chiefly resorted to for keeping up the separation which the Benchers consider desirable between Barristers and Attornies, but in principle the exercise of such a discretionary power is much more fatal to the claim of the Inns of Court to be dealt with as private societies, than the possession of a special jurisdiction over their own members. Most probably when the Judges of the Queen's Bench applied to them the description of private societies, as they did in the case of the *Queen v. The Benchers of Lincoln's Inn*, they only meant that neither the Inns of Court, nor their governing bodies, however public and important might be the functions they performed, had that known legal status, that definite legal form of association, which, according to legal precedent, would make them the proper subjects of a *mandamus*.

In the eyes of the Legislature, and as the subjects of legislation, either as regards their powers or their property, the

Inns of Court can only be considered as public institutions of a very high order, which by means of their governing bodies discharge functions and perform acts of very great public importance.

Such, for instance, is an alteration recently made by them, almost secretly, in what may be called the public law of the country, by which they have admitted and now admit clergymen to be called to the Bar, contrary to their own decision in *Horne Tooke's* case less than a century ago.

It is to be hoped that the Benchers of the Inns of Court when they are brought—as they soon will be—under the practical cognizance of Parliament, will not be ill-advised enough to set up in any form, or for any purpose, this claim to be a “private society,” nor seek to maintain any longer that position which in truth is hardly creditable to them, numbering among themselves, as they do at present, all the Judges in Equity, and having at one time been able to claim as a colleague almost every Judge of the Common Law Bench, the position, we mean, of a body or association performing the functions and possessing the status of a most important corporation, and seeking by underhand devices and contrivances to avoid the responsibility and control to which a Charter defining their Constitution would subject them.

If they meet the proposals for reform in the right spirit, they need not be afraid that anything they may have to urge against any great change in the status of the bar, or in the regulation of its studies, will not be heard and considered with the utmost deference and respect by Parliament and the public.

In respect to their Constitution they will, of course, have to renounce the right of self-election, or it may be the position which they now hold by it; but it will be a great satisfaction to them to find themselves restored by the general voice of the profession to the same place of power and dignity. The funds and property which they now administer, confessedly for no purposes of their own, will be made subject to public accountability, but with these drawbacks, if they

are drawbacks, they will be even more than they are now, the leaders, the censors, and the educators of the English Bar; and if they should be tempted to look back with regret to the mythical times of their *quasi* Bohemian independence (for it was not without some point and truth that they were called by Mr. Neate, in the House of Commons, squatters upon the soil of the Constitution), let them remember that if it is a fine thing to have lived a useful and honourable life outside the bonds of legal existence, it is a much finer thing to lead a more useful and more irreproachable life within its pale, and subject to its conditions, in harmony, as the Inns of Court are not now in harmony, with the rest of our institutions.

VI.—REMARKABLE LEGAL IMPOSTURES.

THE public have been favoured by Mr. Joseph Brown, Q.C., with a comparison of the Tichborne case with previous impostures of the same kind. The enormity and voluminousness of the proceedings and the heinousness of the offence are as fresh in the recollection of our readers as to render it unnecessary to refer here to any part of the case, civil or criminal. Suffice it to say that this alleged Sir Roger Tichborne turns out to be, by the verdict of the jury, after a trial, in length unparalleled in history, to be no other than the big butcher of Wapping, "Bullocky Orton."

Mr. Brown, in introducing his subject, says:—

"Had the juries been acquainted with the former impostures of the same kind, which are found in history and the annals of courts of justice, and with the remarkable features of resemblance which they present to the Tichborne case, it is difficult to believe that they would have required much more than the cross-examination of the Claimant to satisfy them of the true character of his claim. So far from the

Tichborne case being a novelty, to those who are well acquainted with history and jurisprudence, it was but a repetition of a play acted many times before, with the same catastrophe, and generally presenting the same features of romantic interest and plausibility to the multitude, and the same indubitable marks of fraud and imposture to the jurist."

He then proceeds to give an account, abridged from original reports of former trials and impostures, and states how closely they resemble the Tichborne case in their leading features. The first case he notices is that of Martin Guerre, which took place in France about the year 1558.*

"Martin Guerre was a peasant of the village of Artigues, married to a young woman named de Rols, by whom he had a child. Having committed some petty offence, he ran away from home when about twenty years of age and entered the army. Nothing was heard of him for about eight years, and it was not known whether he was alive or dead; when one day a man presented himself at the village as Martin Guerre, and was immediately welcomed with joy by the four sisters and the uncle as their long-lost relation. He appeared altered by years and toil, and by exposure to the weather and other hardships, but bore a strong resemblance to him whom they knew so well, and the only person who had a doubt as to his being the real Guerre was the wife. Her hesitation, however, was overcome by the strong convictions of her husband's sisters and uncle, by the remonstrances of the man, who claimed her as his wife, and, above all, by his relating to her several private circumstances which had passed between her and her husband during the honeymoon. Accordingly she received him to her bed, and they lived peaceably together for above two years, during which time she bore him two children. He was also put in possession of the property which belonged to her husband, and made a claim against the uncle for some land left by the father. This set the uncle against him, and a discharged soldier, who passed through the village at this time, having spread a report that the real M. Guerre was still alive and serving abroad, the uncle stirred up the wife, who had probably learnt some suspicious circumstances, to institute a prosecution against the pretender for imposture and fraud. The cause was heard before the provincial judge, and afterwards before the parliament of Toulouse, and nearly two hundred witnesses were examined on the two sides. Of these, above fifty, who had been intimately

* *Causes Celebres*, vi., old series.

acquainted with M. Guerre, including his four sisters, swore positively that the accused was Guerre, and identified him by many personal traits, as well as by family circumstances which he had related to them. There were an equal number who swore positively that the accused was one Arnould Dutille, a peasant from a neighbouring village, and a third set swore he was so like both Guerre and Dutille, that they could not say which he was. The prisoner meantime treated the affair with the utmost confidence and coolness, and as a mere malicious proceeding on the part of his uncle, and he answered innumerable questions about the past life of Guerre with such success that the court were about to acquit him. But the proceedings having lasted for many months, at last a weather-worn soldier with a wooden leg arrived in the village, presented himself, and claimed to be the real M. Guerre. He was privately confronted with the sisters and other relations, who on seeing and speaking to the war-broken soldier, confessed with tears that he was their brother, and implored his pardon for the mistake they had been led into. The wife also immediately acknowledged him, and begged hard for his forgiveness, which he sternly refused; and the principal witnesses, who had been duped by the impostor, retracted their testimony and admitted their error. In spite of all this the prisoner persisted that he was the true man, and that the wooden-legged soldier was an impostor; but the end was that the prisoner was convicted of fraud and false personation, and was hanged before the house of M. Guerre, after making the *amende honorable* in public. This was in the year 1560. Before his execution, he confessed that he was Arnold Dutille, and repented the cheat which he had practised, and owned that he had been tempted to do it by his strong likeness to M. Guerre, and by having been his comrade for years in the army, during which time he had learnt all his secrets, and had thus been enabled to deceive even his wife."

In this case is to be preceived some of the characteristics of the Tichborne trial. In the following there are still further resemblances, and it is remarkable how closely many portions of the inquiry are identified with the nature of that of the Claimant, and the object in view being exactly the same. The case is that of the De Caille family, which occurred in France in the reign of Louis XIV., and is as follows :

"That king having, at the instigations of his mistress and his confessor, revoked the edict of Nantes, and inflicted the

most cruel persecutions on the Protestants, the Sieur de Caille, an ardent Protestant of old family and considerable estates, fled with his children to Lausanne, in Switzerland, and never returned, in consequence of which his estates devolved by the law upon his nearest Catholic relations. The son of De Caille, a promising youth of considerable acquirements, died at Vevay, in Switzerland, at the age of thirty, and was there buried. About three years after, in the year 1699, a man appeared at Toulon, giving himself out for this same son of De Caille, and having publicly renounced the Protestant faith in the cathedral, he laid claim to the family estates, as being the nearest Catholic heir. His claims were soon supported by a large party who were deeply interested in the religious disputes of that age, and whose compassion was excited by his story. The relatives, who were in possession of the De Caille estates, soon prosecuted him for imposture, while he, on the other hand, claimed the estates as his. The cause was heard before the Parliament of Aix, and a vast number of witnesses were examined on both sides, those for the claimant swearing to his identity with the son of De Caille, while for the family a great number swore that he was not like De Caille at all, others proved that the younger De Caille had died and was buried at Vevay years before, and a third set swore that the claimant was one Pierre Mège, a soldier of the marines, whom they had long known, and who had been condemned to the galleys for various crimes. They relied also much on the fact, that the man had at first given wrong Christian names to his alleged father and mother—had given his own age as twenty-three, when young De Caille, if alive, would be thirty-five, and that he could neither read nor write, whereas the young De Caille had been brought up as a gentleman, and had left letters which were produced in evidence. Besides this, the pretender could not tell the names of the persons he had seen at De Caille's house, either in France or at Lausanne. In spite of these signs of fraud, the number of witnesses who swore to his being the true heir was so great, that the parliament by a majority of voices, decided in his favour; declared him to be son and heir of De Caille, and put him in possession of the family estates and property. This decree was given in 1706, and was received by the bigoted populace with shouts of acclamation, and they conducted the judges in triumph to their houses. Three weeks after this the claimant married a young lady who was a relation of two of the judges who had given the decree. The consequence was, that the wife of P. Mège, a woman of the lowest class, came forward and publicly declared that the pretended De Caille was her

husband, and gave his entire previous history, which showed him to be the son of a wool corder named Pierre Mège, and to have been a soldier, a convict, a galley slave, and a villain capable of any imposture. The ruined family of De Caille appealed against the decree to the Parliament of Paris, and the whole case was heard over again. Not less than 394 witnesses were examined for the soldier, amongst whom were 110 who swore to his being young De Caille, and of these several had been neighbours, or companions, or school-fellows of young De Caille, and a score of domestic servants, and a great many who swore he was not Pierre Mège. On the other side, Honorade Venelle, the true wife of the soldier, proved her marriage to him years before the suit began, and their long cohabitation, and she gave all the history of his past life, which showed he was just the man to play the impostor. Besides her, there were 182 witnesses examined for the Caille family, amongst whom were the father, aunt, and sister of young De Caille, who attended him in his last sickness and death, the doctor and the undertaker, and 130 others, who had known P. Mège for periods varying from fifteen to twenty-five years, and who swore to his being the same with the soldier, whose previous life and offences they spoke to, and also that he had made three different abjurations of Protestantism in different places, in order to gain money from religious people. Amongst these were thirteen near relations of Pierre Mège, and their evidence was confirmed by the documents which attested his marriage with H. Venelle, and the documents of the death and burial of young De Caille. It was observable that the whole family of De Caille repudiated the soldier as an impostor. In the end, in 1712, the Parliament of Paris quashed the decision of the Provincial Court, and pronounced the soldier to be an impostor, and to be P. Mège; ordered him to restore the estates to the De Caille family, and to be prosecuted for bigamy, and declared his second marriage with the young lady to be null and void. The impostor died in prison not long after."

The family was defended by the eloquent advocate, M. de Bliniere,* who, in his argument, cited the following singular case of imposition :

"But," says he, "they urge that it is difficult to presume that a man would have the audacity to assume the character of the son of the Sieur de Caille, during the life of his father; while an infinity of witnesses who knew both of them could detect and confound him, if he were an impostor; that is to

* *Causes Célèbres*, vol. ii. old series.

say, the soldier who relies on this presumption, makes a title of his effrontery and impudence. Thus a woman of the town, Marie Pauport, undertook, in the year 1700 to give herself out as daughter of the Marquis d'Allemand, and she maintained it for three entire years against both the father and the mother. The marquis and his lady, who were both highly esteemed in their province, had the grief of seeing the country people rise up against them. It cost them above 100,000 livres; and at last, after a decree which declared that the woman was a false pretender and should be prosecuted for the imposture, her emissaries got her out of the way. Judge from this of the merit of a presumption drawn from the impudence and effrontery of an impostor. Let them tell us how it is possible that in 1628 an adventuress, a girl who appeared to have some wit, should have dared to pass herself off for Henrietta, the sister of Louis XIII., and wife of Charles I., King of England. This girl went to Limoges; and gave herself out for the sister of Louis XIII. She there entered into a nunnery. People ran to see her; they addressed her as a princess; they served her as a queen; the people were completely seduced. Louis XIII., then at the siege of Rochelle, was informed of it, and sent a commission to prosecute the girl. She was interrogated, and she related the history of the English court; she gave the names of the principal lords and ladies who waited on her. She stated that she had fled from England, because she was persecuted for her religion. She gave the particulars of her voyage, and the persons who were in her interests, with times, places, and circumstances. Everything was connected in her answers. She maintained that she was the king's sister, and she signed her examination, 'Henriette de Bourbon.' The end of it was that she was condemned to make the 'amende honorable,' to be whipped by the public executioner, and to be imprisoned at the king's pleasure. For a woman to have the audacity to present herself in France as the king's sister, the wife of king Charles the First, and queen of England, while the queen was perfectly well in England, seems to pass belief—and yet the people were deceived. No doubt many of them thought it must be the real queen of England, because no one would attempt a cheat which was so certain to be detected and punished."

Mr. Brown remarks that the judges ordered what our Courts have no power to do, that is an examination of the body of the Claimant. The Court also ordered that the prisoner should not assume the name of "De Caille" during the inquiry. The next case is one which occurred in the

Indian Courts, in the year 1838 and 1839.* The estate in question was the Zemindarree of Burdwan, about seventy miles from Calcutta, a magnificent property yielding about £200,000 a year, containing a splendid palace surrounded by lakes and gardens, with every luxury that India can exhibit, and giving the title of Maharajah to the proprietor.

“In the year 1820, this princely estate was the property of Tej Chunder, Rajah of Burdwan. At that time his son, Pertaub Chunder, known as the young Raja, fell ill of a fever and, in the presence of numerous relatives and dependants, was carried in a dying state to the banks of the Ganges near Culna. There, in the sight of the holy river, so dear to orthodox Hindoos, he departed this life; and, with all the solemn rites and customs suited to the occasion, his lifeless body was committed to the flames, and reduced to ashes. The few remnants spared or calcined by the fire were collected and deposited in one of the halls of the palace at Burdwan, and a monument was erected over the spot. In due time the father followed his son to the river bank, and to the funeral pile; and the property, which then vested in a minor, an adopted son, was managed by a native gentleman, known as Praun Baboo. Years passed away, and the inhabitants of the district had begun to forget the existence and death of the young Raja, when in the year 1835 a person suddenly made his appearance in the adjoining district of Bancoorah, and, giving out that he was the deceased Pertaub Chunder, collected together a considerable number of adherents, and laid claim to the Burdwan estates. In the course of two or three years he succeeded in convincing a number of persons, both Englishmen and natives, that his claim was a just one, and they supplied him with money. He then served notices on the tenants, requiring them to withhold payment of their rents to the manager or guardian of the minor, and brought an action in the Supreme Court of Calcutta to recover the princely estates. But the proceedings of the claimant and his followers, who attempted to get possession by force, were so tumultuous and alarming that the military were called out, and prompt measures taken to disperse the assemblage and to apprehend its leader. The pretender was arrested, and committed for trial at the Hooghly Sessions Court on the charge of fraud, imposture, and false personation, combined with riot and breach of the peace. This prosecution came on for trial before the civil action was heard. The case for

* Nizamut Adawlut Reports, vol. v.

the prosecution was plain and simple enough. The young Raja had died eighteen years before, like a good Hindoo, almost in the presence of a weeping parent, and in the sight of friends and attendants who might be trusted to believe their own senses. Here was no question of a departure for a distant colony, or of years spent somewhere across the ocean, in the plains of Australia or the Cordilleras, nor was there any doubt as to the heir's disappearance in one vessel on the high seas, and his miraculous rescue by another. The claimant's story was a marvellous one. Praun Baboo, he said, had prejudiced the father against the son, and had even attempted to poison the latter. Being thus estranged from his nearest relative, the young Raja spent years in immorality and vice, and at last, in the act of committing some extremely heinous offence, was struck by sudden 'remorse — somewhat after the fashion of Dickens' stage hero, who, when about to blow out his brains, heard a clock strike ten, remembered that he had heard that hour strike in the days of his innocency, and became a virtuous and reformed character ever afterwards. Consulting the oracles of his religion, the young Raja was enjoined to absent himself for fourteen years, and to perform pilgrimages incognito; and with this view, he feigned a mortal sickness, was conveyed to the river-side, and requesting the bystanders to withdraw in order that he might offer up his soul to Heaven, dived into the stream, was received into a boat, and left in his room a huge chest filled with shells, which the bystanders reduced to ashes under the belief that it contained the corpse of their young master. The sequel of the story was that, accompanied by one devoted adherent, he washed away his stains in the Brahmaputra, visited hallowed shrines as a pilgrim, travelled in Cashmere and the Punjab, and finally returned fifteen years after to claim his own again. The accused made no attempt to prove his version of the actual disappearance, but called numbers of witnesses who had known the young Raja to prove his identity. The prosecution undertook, on the other hand, to show that the self-styled Raja was one Kistolall, alias Alak Shaha: that he was well known as an inhabitant of the neighbouring station of Kishnagur, that he was a person of considerable abilities, and capable of influencing and even fascinating others; and that he had been in the habit of going about the country in the guise of a religious mendicant and of occasionally representing himself as an incarnation of the Deity."

The result was the conviction of Pseudo-Raja of false personation and imposture. Comparison is here drawn between the kind of evidence in that and the Tichborne case,

and the class of witnesses, and it is remarkable how much of the evidence in either case resembles the other. Mr. Brown then tells the story of Mrs. Ryves, Perkin Warbeck, Baldwin, Count of Flanders, and of the many attempts to personate Louis XVII. of France, and descants on the subject of imposture by false personation generally, which he says is mostly unlike the Tichborne case, but induced, by a resemblance of features, which exist between the true man and the impostor, and relates how, in modern times, many innocent men have narrowly escaped conviction of crimes. He also mentions instances of remarkable personal resemblance, and marvellous change of appearances brought about in individuals in a comparatively short time from natural causes. The explanation of personation, generally, he says, lies in the prize to be won, which is generally very great, either a large estate or a kingdom. Mr. Brown thus concludes his observations :

“ Our statute law has provided for the crime of false personation of stockholders in the public funds, with the view of fraudulently getting possession of their dividends, and of officers and soldiers in order to get their pay and pensions, or of voters at elections, in order to exercise the franchise. But there is no such crime known to our law as false personation of the lost heir to an estate, with a view to get possession of his property. The villain who attempts this part can only be reached if he commits perjury or conspiracy to promote his claims, and consequently he can neither be arrested at the outset of his career, nor punished to the full measure of his deserts when he is convicted. He may act the part of the impostor for months or years, during which he is daily acquiring fresh knowledge of the history and habits of the missing heir, and thereby daily making fresh dupes; he may even get into possession of the property with impunity; it is only when he comes into a court of justice and swears falsely in support of his claim that the criminal law can reach him, and even then it can only punish him for perjury. Now when it is considered that impostures of this kind are generally attempts at robbery on a gigantic scale, and attempts to make the very courts and officers of justice the instruments of fraud and plunder, that they tend to involve innocent families in enormous expense and ruin, and even to get up a popular outcry against the ministers of justice, it may seem that perjury is the

least part of such an offence. If a man falsely and wilfully swore that he saw another commit a murder, and thereby caused an innocent man to be hung, the public would think such a crime involved murder as well as perjury. Surely there ought to be a statute that if any man falsely personates another, with intent to defraud any person of any property or title, or to claim a false relationship to any family, he should be guilty of felony, and punishable as such.

It is easy to be wise after the event. It would have been unwise, and unlawful even, to have been wise *during* the event, and probably the Court of Queen's Bench would have promptly disposed of any rash person, who had published any such candid exposition of his private views during the trial.

Mr. Brown, we think, very clearly shows the wonderful family likeness which exists between the well-known cases of imposture; at the same time, he does not give us any account of the *Smyth v. Smyth* case, a case of first interest. But we do not look to Mr. Brown, who is an able and experienced lawyer, to give us a dry narrative of facts, or quotations from Pope to show the sanctity of all human affections. To a man such as he is we look for advice, and we derive much pleasure in all that is imparted to us. We expect him to make valuable suggestions to show how such great legal scandals can be avoided in future. No doubt the Court ought to possess powers which no Court at present in England possesses. It should have the power of ordering a medical examination to be held, of ordering the attendances of witnesses, ample powers of adjournment, and many other things which it is easy to discuss in the abstract, but which, nevertheless, are open to discussion in the concrete. Crime, we all know, is common-place and vulgar. The same symbols accompany it in every clime, for it springs from the same feeling of our nature, but the converse of the proposition is by no means the same, that because the circumstances of a particular case resembled those in an arrant case of imposition, that, therefore, both were impostures.

Mr. Brown seems to think that the true way to expose an

imposture would be to give in evidence (were such a thing now possible) other cases of imposture, and then ask the jury to draw the inference desired from the likeness between the cases. We think whatever labour is caused by it, that the true way to detect so-called imposture is to subject it to vigorous analysis and examination. It will stand or fall, according as the tale is true or false.

BOOK REVIEWS.

THE COMMENTARIES OF GAIUS AND RULES OF ULPIAN.—Translated by Dr. Abdy and Dr. Bryan Walker.—The translation of the Commentaries of Gaius, published by Dr. Abdy and Dr. Walker, is well-known, and in presenting a second edition of the work they have added a translation of Ulpian's Rules, and give good reasons why they should be added to the Commentaries of Gaius. One is that "these writers are the only two (if we except Paulus), whose works have been preserved to our day in anything like a collated form, and both treatises so fortunately preserved are rich in illustrations of the early Roman law. Again, between these two treatises there is a close affinity, both being meant to exhibit the leading doctrines of the Roman law as it affected persons in their private capacities, and both are *compendiums* of law equally useful to the student and the practitioner." The learned translators having already in their preface to their former work given an admirable account of the great work of Gaius, now give an equally admirable account of Ulpian as one of the leading authorities in Roman law. They remark that, though following in the main the arrangement of Gaius, he interpolates largely which they account for in this way. Gaius, they suggest, wrote a handbook for students with the intention of putting clearly before them the leading principles of Roman law. His object, they think, was to present a comprehensive outline of the Roman law as a system. On the other hand, Ulpian's aim, they think, was rather to draw up a handbook for the use of practising lawyers, and with this view took as a basis the scientific treatise of Gaius, introducing into it the necessary modifications with reference to the requirements of practice. If this view be correct, no one can doubt the importance of studying both works, and it may well be

understood how, as the translators say, the two works materially throw light upon each other.

As to the accuracy of the translations here presented, the learned translators of course are pretty certain to be literally or grammatically correct, but we confess to some doubt whether they have always hit on the real meaning. In the passage of Gaius, for instance, in which he defines the authentic portion occupied by the jurisconsult—"Responsa prudentum sunt sententia et opiniones eorum quibus permissum est *jura condere*," they translate it thus: "The responses of the learned in the law are the decisions and opinions of those to whom license has been given to *expound the laws*," and they say, in a note, "Augustus commanded that none should practice 'without a licence,'" and it is to this that the words of Gaius "permissum est" refer. We venture to think that this is an entire error, and that the phrase, "*jura condere*," had a far weightier meaning than mere private opinions, with which it was never intended to interfere, and which it required no permission from the Emperor to authorize. What was meant was the opinions given by jurisconsults, when consulted as legal assessors by the judges. This practice is alluded to in writers of the third and fourth centuries (as, for instance, St. Austin), and as the judges were laymen, the opinion of these official jurisconsults when consulted by them ruled and governed the decisions of the judges as to the law. Hence Gaius goes on to say: "quorum omnium si in unum sententiæ concurrant id quod ita sentiunt leges vicem obtinet, si vero dissentiunt, judice licet quam velit sententiam sequi idque rescripto Hadriani significatur." That is, the rescript of Hadriani declared that the judge, if the jurisconsults differed among themselves, might decide on his own view of the law, otherwise he was bound by theirs. It was to this the Imperial permission related, not a license to mere private practice. This is an illustration of the necessity for study of the history of a subject in order to understand the real import of phrases used by ancient writers, and without the due degree of historical knowledge, there will be frequent error and misunderstanding.

Every possible facility, however, is afforded to the student for verifying or testing the accuracy of the versions given by the learned translators, who put the original text above their translation, and append notes—succinct, yet sufficient, to indicate the source of information or the authorities for their opinion. Frequently, though by no means invariably, original authorities are cited. And, upon reference to the original authorities, it will

often be found that the translators are in error. Thus, in the course of a useful note in the appendix on the Nature and Procedure of the Roman Actions (which is often far too formal and technical, through the use of the mere phrases without an explanation of their real meaning), the reader is led to suppose that the Prætor's delegation of a judge, by a formula, was the ordinary course; whereas, on the contrary, the ordinary course was for the Prætor to hear and decide the case himself, and the delegation to other judges only arose by degrees, as judicial business increased, and was rather allowed as an extraordinary course than was recognised as the regular and ordinary course. The failure to observe this has led all writers, from Heinneccius and Montesquieu to Savigny, and down to our own Sandars, into a curious misconstruction of the passage in the Institutes in which Justinian says, "*omnia judicicia sunt extraordinaria*," which has been supposed to mean exactly the contrary of what it really meant—namely, that all cases were determined by the Prætor himself, without delegation to judges; whereas, on the contrary, it meant just the reverse, *i.e.*, as we might *à priori* have supposed, that as business had so vastly increased, all of it was delegated to judges, who by degrees became permanent and official functionaries, the Prætor remaining a sort of minister of justice. Originally, however, he heard all cases in the first instance, at once deciding such as were clear and plain, as probably the greater number were, his preliminary sittings for the purpose being called *de plano*. If, however, any question of doubt or importance arose, it was heard before him in more formal sittings with the aid of legal assessors; and these sittings were called *pro tribunali*. The translators have not quite conveyed the true meaning of these different kinds of sittings, failing to observe that all cases went through the first stage before sittings *de plano*, where the greater number were at once disposed of. There is a passage in Mr. Austin's book in which this is well explained. But under the impression that the ordinary course was to refer cases to delegated judges, and that, therefore, the ordinary course was to demand a judge, the translators fell into a common blunder. They say "that the custom of demanding a judge was a very ancient one, even in Cicero's time, we learn from a passage in the *De Officiis* iii. 10, where he speaks of it as 'that excellent custom handed down from the practice of our ancestors.'" Here we see the mischief of careless citation. Cicero says no such thing. The passage is this: "*Itaque præclarum a majoribus accepimus morem rogandi judicis (si enim teneremus, quod salva fide facere possit.*" That is, that the

excellent custom was to beg of the judge to be as favourable as his oath would allow. Nothing whatever is said or implied as to the mode of obtaining the judge, nor even whether civil or criminal cases are alluded to. Still less whether the judge is original and official or delegated. Nor is there anything about demanding a judge. The truth is, the translators stopped short in their citation, and have given an entirely wrong version of it.

In a note in the appendix (*k*) the translators come very near to the truth, but still fail fully to apprehend it. They state that when the facts were admitted the question was settled by the Prætor himself, and that the Prætor only remitted a case to a judge that he might ascertain the facts and apply the known law, or report the facts to the Prætor if the law was in doubt, or there was need of some new equity, or equitable extension of the existing law. But the question might be a mixed one of law and fact, which indeed, is usually the case, and so the question remitted might be rather as to the application of the law than the ascertainment of disputed facts. Hence Gaius himself says that in some cases the question remitted was one of law, and in others one of fact. "*Sed eas quidem formulas in quibus de jure quæritur, in jus conceptus vocamus.*" "*Ateras vero in factum conceptus vocamus.*" And by examples he illustrates his meaning, and makes it clear. Yet, strange to say, the learned translators in a long note insist on a different meaning from that which Gaius himself had explained, and they say, after an attempt to state reasons, which really are no reasons at all, "Hence when the jurists speak of *conceptio in jus*, and *conceptio infactum*, they are not referring to the nature of the issue to be tried—whether of law or fact—but to the nature of the enactment, civil or prætoriam, on which the litigation turned," which is exactly contrary to what Gaius had said, so that his translators insist on knowing his meaning better than he could know it himself. This comes of not sufficiently studying their author, and making him his own interpreter. It is curious in what a maze of blunders they are involved, through their starting with a false theory, and making their author's language square with it. They started with the idea that '*legitima*' only meant an action, founded on a *lex*, or written law, and so was synonymous with statutory. But they come to this sentence, "*Ceterum potest ex lege quidem esse iudicium, sed legitimum non esse, et contra ex lege non esse sed legitimum esse,*" which, according to their theory, they have to translate thus: An action may be derived from a *lex*, and yet not be statutable, and conversely it may not be derived from a *lex* (a statute), and yet be statutable," which of course is absurd.

But the context shows that 'legitima' did not mean statutory, for Gaius goes on to point out that the test is the procedure, and that therefore though the action was on a lex or statute, yet if the parties were not Roman citizens, it was founded on imperium; but that if the action was on the Prætor's edict, yet if the parties were Roman citizens, the action was legitima. "Et ex diverso si ex ea causa ex qua nobis edicto Prætoris datus actus Romæ sub uno iudice inter omnes cives Romanos accipiatur iudicium, legitimum est." In the teeth of which, the translators still adhere to the absurdity of translating the last word "statutory!" which makes manifest nonsense of the whole passage! So it is in many other instances, the translators entirely misrepresent Gaius because; instead of taking his meaning from himself, they persist in making him mean what they please, and adapt their translations to it. This has arisen from insufficient study of their author, and of the original authorities of the Roman law, and too great dependence on the ideas and opinions of commentators, some of very doubtful authority, as Heinneccius. Thus on another cardinal point the translators lapse into error, that is as to the import and distinction between the "judicia legitima" and the "judicia imperio continentia," as to which Gaius says distinctly that the former are such as are decided by ordinary civil or municipal law applicable to citizens. "Legitima sunt iudicia quæ in urbe Roma, inter omnes cives Romanos sub uno iudice accipiuntur," whereas the others were such as arose when one of the parties was a foreigner. "Imperio vero continentur recuperatoriæ et quæ sub uno iudice accipiuntur interveniente peregrini persona iudicis aut litigatoris." It could hardly be supposed that the translators would seek to affix a different meaning to the phrases so distinctly explained by their author. Yet they do so, and invariably translate legitima "statutory." Nor do they stop there: they sometimes support their wrong versions by an utterly false translation, and one calculated grossly to mislead. Thus in the passage: "legitimo iudicio debitum petro, postea de eo *ipso jure* agere non possem," which they translate: "If I sue for a debt by statutable action, I cannot afterwards, by the letter of the civil law, bring another action for the same," where the words 'ipso jure' are actually translated "by the letter of the civil law," whereas the real meaning is clearly this, that when a party had brought an action founded on ordinary law and failed, he could not bring another action on the same right—a rule exactly analogous to our own, which forbids a second action for the same cause of action as the first. It was otherwise, said Gaius, if the judgment sought was founded on

imperium, for the obligation still remains, and so may proceed upon the same right, "Aliter atque si imperio continenti iudicio egerim, tunc enim obligatio durat, et ideo ipso jure postea agere possum." Just as a man, failing at law on a deed or a bond, may, if he can, still proceed on equity. The translators, however, will have it that the meaning is that if there was a new Prætor the party might proceed again under his edict! When we look to the notes for a clue to this strange blundering, we find it in a reference to Heinneccius! Thus the translators take the meaning of Gaius not from Gaius, but Heinneccius. On the whole we are compelled to say that though this is a valuable work in that it offers great facilities to the student, it cannot be taken always as a safe guide, and that the student must not rely on the translation or notes as conveying the real meaning of Gaius, but that he must study his author carefully for himself and seek to make that author as much as possible his own interpreter, using such other references as may be given to original sources of the Roman law, but not allowing himself to be misled by second hand sources, and the opinions of commentators and translators. Especially, above all, let him beware of Heinneccius.

TWO LECTURES ON INSURANCE AND INSURANCE LAW. By Anderson Kirkwood, LL.D., *Emeritus* Professor of Conveyancing in the University of Glasgow. (London: C. Layten, 1874.) It is delightful to learn that in the great modern centre of trade and commerce several distinguished legal gentlemen, last winter, delivered lectures to the students of law on various branches of jurisprudence. Dr. Kirkwood, who though retired from the professorial chair of conveyancing is still engaged in extensive legal practice, kindly volunteered two lectures of this course. Keeping in view the city wherein he delivered his prelections he wisely choose for his subject the Law of Insurances. He deals briefly but still exhaustively with the three great objects of Insurance—Marine, Fire, and Life. The subject is dealt with popularly, but not perfunctorily. A bird's eye view is given of the whole field. Enough is given to the tyro to grasp the principles, so that by consulting the decisions he may apply the rules to any particular case which may arise in his future practice. The lecturer states the importance of the subject by estimating its financial value. He sets down for the year 1872: British Marine Insurance at eight hundred millions sterling; Insurance on fire at nearly two hundred millions; subsisting life policies at three hundred millions, making a grand total of three thousand millions of pounds sterling embarked in Insurances.

The lecturer begins with Marine Insurance, giving its history from the earliest times with reference to Institutional writers and decided cases both in England and Scotland. He proceeds to analyse the formula of the policy, the parties and subjects embraced by such, and he concludes with a brief but accurate summary of the results in loss, either total or partial, and the consequent questions of general and particular average.

The lecturer next deals in like manner with Fire Insurance. Tracing its history from the great fire in London in 1666, he proceeds to give the dates of the early companies which entered on this important field tax. He states the history of the tax imposed on this class of insurance, until its abolition of risk so late as in 1869. With much propriety he describes this duty as the worst that can be imagined, because a tax on "prudence." The lecturer proceeds to illustrate the various questions which have arisen and the points decided by the Courts of both countries on this extensive branch of insurances.

The remainder of the pamphlet is occupied with the history of assurance on life. A most interesting sketch is given of the various tables of mortality which from time to time have been adopted as the bases of life premiums. The defects applicable to each table are clearly stated. The questions which have arisen and been decided in our Courts of Law are given, but we regret, often without any reference to the Reports. The leading provisions of the Act, 1870, are set forth. The lecturer laments the collapse of the European and Albert Companies with the consequent costly and unsatisfactory arbitrations, which he characterises as being "a standing scandal and injury to Life Insurance." He adds, "It would have been for the interest of all life offices (if they had had the power) to make some considerable contribution in order to assist in winding up these concerns and have them buried out of public view."

It was well that the lecturer consented to give these contributions to legal science in this cheap form. The pamphlet will be found of great value as a "handy book" to the profession and a ready guide to the mercantile and commercial classes of the community.

ESSAYS CRITICAL AND NARRATIVE. By WILLIAM FORSYTH, Q.C., LL.D., M.P. (London: Longman, Green and Co., 1874).—Mr. Forsyth's essays have been published in reviews and other periodicals, and the author naturally desires to secure for them a more permanent record. In this attempt we think he is not likely to be disappointed. Many of the papers contain valuable discussions on important subjects, and there is not one of them

which is devoid of interest. Our only doubt is, whether the narrative essays will not be generally preferred to the critical. But in all alike will be found a great deal of very valuable information conveyed in a very agreeable manner, while no attempt is made to import political prejudice into any of the questions touched upon. In fact throughout, the reforming tendencies of Mr. Forsyth's mind are rather more strongly shown than his conservative bias, and thus, of course, his writings are all the more interesting and instructive.

Of the essays relating to the amendment of the law, the most important is that on "Criminal Procedure." Mr. Forsyth here enters into a comparison between the Scotch and English systems, and maintains that in each "there are deficiencies that might be supplied, and faults that might be corrected, by the example of the other; and that from a judicious amalgamation of the two might be formed a system of procedure superior to either as it now stands." We cannot at present discuss the important questions connected with this subject which the author has brought forward, but we can safely recommend the essay for the information it contains and the suggestions it offers.

Looking at the volume from the legal standpoint, the next essay which attracts our attention is that on "The Judges of England," being a review of the great work on this subject of the late Mr. Foss. Mr. Forsyth has here set out the leading features of the History of our Judicial system, and given brief but interesting sketches, of many of our most celebrated judges. Of course the materials are chiefly drawn from Mr. Foss' work, and from other sources, but they are worked up into a very admirable essay. Among the other contents of the volume, we may mention a review of Lord Brougham's speeches, and an article on the progress of Legal Reform, both of which are well deserving a perusal. Mr. Forsyth's high opinion of Lord Brougham as an orator and a law reformer is fully justified by the evidence adduced in these two articles. Although written by a friend and admirer of Lord Brougham, they show no exaggeration of the merits of the great orator and law reformer, but convey only the just tribute of an appreciating mind. We have also read, with great interest, the lecture on William Cobbett, which affords a good specimen of the fair and candid manner in which Mr. Forsyth treats those whose views differ from his own. We need scarcely add that through the whole of the papers in the volume we see the unmistakable marks of the practised writer and accomplished scholar.

INTRODUCTION TO ROMAN LAW. By J. HADLEY.—This is beyond all comparison the best *first* book for students on the Roman Law. It puts into a clear, succinct, and correct form all that is necessary to be known by way of preparation for the study of the subject. The late professor Hadley (of Yale College, America) held a very high place in the judgment of American scholars, and prepared a series of academical lectures on the subject, the success of which it is said suggested their publication. The Professor possessed, it is stated, uncommon clearness of style and method, and power of exact expression, and these qualities are certainly exhibited in a high degree in the present work. The subject is first treated historically, and the sources of the Roman Law in its earlier and later periods are traced and described. Here the subject is treated analytically with reference to the law of *status* and family relations, the law of property, and of rights on property, the law of obligations, and the law of inheritance. Altogether it is excellent as a first book, a mere *primer* of Roman law, but it is no more than that.

THE CENTRAL LAW JOURNAL.—St. Louis, U.S.A.—This is a new legal weekly periodical, edited by an able judge associated with a gentleman the author of several law books. It contains short articles principally of local interest coming within its scope, and general legal intelligence; but the most important is the reports of cases, which are exceedingly well done. Such a work, published at short intervals, must be invaluable to the practising profession of any State, and as these are numerous, much legal information is to be gained from the decisions of a number of separate tribunals. It would be well if the plan adopted in *Hooper v. Miller*, in No. 5, could be followed generally, by adding by way of note the English and other rules on the same-subject. Thus, for instance, in an action to recover damages resulting from injuries sustained by a gunshot wound received by means of a spring gun, the law of trespass in regard to such engines is ably given, appended to which is a long note of English and American authorities.

MECHANICS' LIEN LAWS IN NEW YORK CITY, STATUTES DIGEST, AND NUMEROUS FORMS BY M. S. GUENESY Counsellor at Law, New York 1873.—This work is a very fair specimen of the mode in which Law Books are published in the United States, but it is of little value to the English practitioner. The present volume is a handybook to the laws which now obtain in New York City, and which are in force under the statutes of 1867 and 1855. The law of lien being the creation of Statute law has a far more extended operation in the States than in this country.

It is only due to the learned author of this valuable work to say, that it is a model of careful compilation, and will most assuredly be found of value to the practitioners, who practice in the district where these Statutes are in force.

APPOINTMENTS.

The following have been appointed to serve on the Royal Commission of inquiry into the relations existing between masters and servants:—The Lord Chief Justice of England, Lord Winmarleigh, Mr. Bouverie, M.P., the Recorder of London, Sir Montague Smith, Mr. Roebuck, Q.C., M.P., Mr. T. Hughes, Q.C., Mr. Goldney, M.P., and Mr. M'Donald, M.P.; Sir Richard Baggalley has succeeded Sir John Karslake as Attorney-General, and Mr. John Holker, Q.C., has succeeded Sir Richard Baggalley as Solicitor-General; the honour of a baronetcy has been conferred on Mr. Philip Rose, solicitor; Mr. R. E. Webster has been appointed Postman, and Mr. James Anstie Tubman of the Court of Exchequer; Mr. T. B. T. Hildyard, M.P., Chairman of the Notts Quarter Sessions; Mr. Loftus Leigh Pemberton a Registrar of the Court of Chancery; Mr. J. H. Gresham, Chief Clerk to the Lord Mayor at the Mansion House; Mr. Richard Edmonds, Registrar of the Stonehouse County Court.—*Straits Settlements*.—Mr. J. C. Thompson has been appointed Attorney-General for the provinces of Griqua Land West.—*Scotland*.—Mr. David Mure has been appointed one of the Lords Justiciary.

BAR EXAMINATIONS.

EASTER TERM 1874.—At a general examination of students of the Inns of Court, held at Lincoln's Inn Hall, on March 31 and April 1 and 2, 1874, the Council of Legal Education awarded the following gentlemen certificates that they have satisfactorily passed a public examination:—Mr. John Channon Lee Bassett and Mr. Ananda Mohan Bose, of the Inner Temple; Mr. John Brumell, of the Middle Temple; Mr. Sabapathi Iyah Cumbumpati, of Lincoln's Inn; Mr. Ernest Eiloart, of the Inner Temple; Mr. Ernest Badinius Florence, of the Middle Temple; Mr. William Brskine Foster, Mr. Samuel Houghton Graves, and Mr. Edward William Hawker, of the Inner Temple; Mr. Arthur Jepson, of Lincoln's Inn; Mr. Charles Edward Jones, of the Inner Temple; Mr. Ashley Henry Maude, of Lincoln's Inn; Mr. Douglas Metcalfe and Mr. Thomas Stewart Omond, of the Inner Temple; and Mr. Thomas Alfred Spalding and Mr. Robert William Taylor of the Middle Temple. They awarded to Mr. Montague Clementi, of Lincoln's Inn, a certificate that he has satisfactorily passed an examination in Hindu and Mahomedan law and laws in force in British India.

THE LAW MAGAZINE AND REVIEW.

No. V.—VOL. III.—JUNE, 1874.

I.—LEGAL POSITION AND LIABILITIES OF DIRECTORS OF JOINT STOCK COMPANIES.

JOINT stock enterprise is a tree of modern growth, which, at first regarded with disfavour by the courts of law, then taken under the protection of the legislature, has attained in this country unparalleled proportions. Railways, docks, canals, bridges, the working of mines, the supply of gas and water—all great works, in short, beyond the resources of individuals—have been achieved by the combination of individuals in companies. And there is scarcely any branch of trade, commerce, or manufacture, to which the principle of association has not been similarly applied.

In numerous cases great advantage to the general public has been accompanied by that remunerative return to the subscribers of capital which is promised in all. On the other hand, the failures of joint stock enterprise are no less conspicuous than its successes. The crash of companies and the ruin of their members is a sufficiently familiar feature of modern times. True it is that since the passing of the Limited Liability Acts individuals recommended by their solvency are no longer singled out and stripped to the skin by the creditors of a company—the fate of many in the days when the ordinary partnership law was equally meted out to firms of half-a-dozen partners, and to associations of many hundred members. Yet, under the impulse given by

those Acts, certain vaticinations of experienced judges have been fulfilled. Within the last twenty years, though it may well be that, "not limited liability but unlimited fools are to be blamed," fewer shareholders may have been ruined, but more have suffered. Looking, then, to the magnitude of the interests involved, the law relating to the position and liabilities of those entrusted with the management of joint stock companies, whether towards third persons dealing with them, or towards the members of their companies, must necessarily be of the highest importance. The present state of this law it is now proposed briefly to examine.

To a certain extent the legal position of directors of a company is readily defined. They are agents of the company. But two kinds of agents are known to the law, namely, *general* and *particular* or *special* agents. The distinction, as is well known, is that the former are deemed to have a general authority to bind their principal in all matters within the scope of the business for which they are agents; the latter can only bind their principal within the limits of the particular authority delegated to them. A partner in a firm and a master of a ship, for example, are general agents, with authority to bind other partners and the owners of the ship respectively; a person employed to buy a horse at a certain price is a particular agent.

Directors are treated as particular agents,* and from this doctrine important consequences flow. For it follows that third persons dealing with directors must, in order to be safe, ascertain the limits of the authority conferred on them by the constitution of their company; since, if they exceed that authority, such persons will be left without any remedy against the company, their principal. The justice of this doctrine has been questioned, though the powers of directors can always be ascertained. Practically, no doubt, in the hurry of business this precaution is very often neglected, and in some cases even a careful perusal of a deed of settlement, or memorandum and articles of Association, may fail to con-

* Ernest & Nicholls, 6 H. L. C., 401, &c.

vey a correct idea of their real effect. It might be argued, also, that those who deal with directors ought to be entitled to rely on the nature of the business of the company, no less than in dealing with a partner they can rely on the nature of the business of the firm ; and that, if this were so, companies would be more careful in choosing their directors, to the benefit alike of themselves and of the public. But a person who is not obliged to go near the fire has not much right to complain of burnt fingers. If, under the present law, hardship is occasionally inflicted on third parties, there would, it is conceived, be greater hardship in holding shareholders in a company, whose constitution expressly restricts the authority of its directors, bound by bad bargains made by those directors in defiance of the restrictions imposed on them. Nor is it to be inferred, that by the escape of the company, such third parties have no remedy at all. The principle that persons professing to act with authority on behalf of others impliedly warrant their authority, and if it turns out that they have no such authority, are liable in damages to parties thereby damnified, is clearly established.* This liability arises, not on the contract, but on such warranty, and if the persons liable are not solvent, those dealing with them must, of course, bear the loss.

From this personal liability for unauthorized acts, directors, like other agents, may be absolved by a ratification by their principal—the company. Two classes of cases must be here distinguished. If the act be not only beyond the powers of the directors, but beyond the powers, or (as it would usually be more accurately put) outside the objects, of the company, also, any supposed ratification by the company is unavailing. That a so called ratification by any body of an act which that body has no power to perform, must be a nullity, scarcely needs comment.† But if the act done, though beyond the

* See, e.g., the recent case of *Williamson v. Lawson*, L.R. 6, Q.B. 276.

† A confirmation doth not strengthen a void estate, for confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void at law.—Co. Litt. 269 b.

powers of the directors, is yet within the powers of the company, it is competent for the company to ratify that act in the same manner in which they could have performed it. The difficulties in these cases arise partly in determining the nature of the act in question; partly in determining the completeness and validity of the alleged ratification.

Another mode in which directors may render themselves personally liable for large sums of money is by the careless execution of promissory notes, or similar instruments, on behalf of their company. The rule is, that a person signing a contract in his own name, without qualification, is *prima facie* to be deemed to be contracting personally, and to prevent his liability attaching, the document must shew that he did not intend to bind himself as principal.* No doubt it is most important that an instrument should shew unequivocally who are the real parties to it, but there are instances in which this rule may possibly be thought to have been carried to a somewhat extreme length.

As to the liability of directors, both at Law and in Equity, for fraudulent misrepresentations made by them in that character, there is no more doubt than in the case of other people. The nature of this liability at law is thus expressed in *Gerhard v. Bates*,† by Lord Campbell. "If A fraudulently makes a misrepresentation which is false, and which he knows to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action on the case against A for the deceit." Nor is there any doubt as to the concurrent jurisdiction of Courts of Equity on a bill for indemnity by the party damaged.

The law would, indeed, be short-armed if it failed to reach such a case as that, put by Lord Campbell. Unfortunately other cases are less simple. The whole subject is in practice entangled with difficulties as to what amounts to fraudulent

* Notes to *Thomson v. Davenport*, 2 Smith, L.C. p. 844, 6th Edition. *Lindus v. Melrose*, 3 H. & N. 177. *Price v. Taylor* 5 H. & N. 540.

† 2 Ell. and Bl. 476, 17 Jur. 1097.

misrepresentation, as to the intent of the party making the misrepresentation, as to its materiality, and as to whether the other party was in fact induced to act on the credit of it. Moreover, an element of confusion has been introduced through the attempts made in several of the cases to obtain relief under circumstances which afforded no real ground for imputing deceit.*

These questions it is impossible within the present limits to enter into, but a few words may be said on one important point, namely: Whether a person who makes or is party to an untrue representation, which he does not know to be untrue, is to be held liable thereon. It was decided in *Chandelor v. Lopus*,† (the Bezoar stone case), that no action would lie unless it be shewn that the maker of the untrue representation knows it to be so; and this doctrine has been repeatedly affirmed. In a late case in Equity,‡ for example, Vice-Chancellor Wood laid it down that in order to make a director personally liable for a false representation you must fix him with a guilty knowledge—"with what is technically called the *scienter* upon an action for deceit."

On the other hand, in the case of *Evans v. Edmons*,|| Justice Maule observed, "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if he does so, either with a view to secure some benefit to himself or to deceive a third person, he is, in law, guilty of a fraud." The high authority of Lord Cairns goes further: "I apprehend it," he said, in delivering his opinion in *Reese River Mining Company v. Smith*,§ "to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or un-

* See, e.g., *Stewart v. Austin*, 3 Eq. 299. *Ship v. Cresskill*, 10 Eq. 78.

† 2 Croke 2. 1 Smith Lead Ca. 165.

‡ *Henderson v. Lacon*, 5 Eq. 249; and see *Attwood v. Small*, 6 Cl. and Fin. 444.

|| 13 C.B. 777. See also *Taylor v. Ashton*, 11 M. and W. 401.

§ L.R. 4 H.L. 64. The same view was expressed by the L. J. J., in the well known case of *Rawlings v. Wickham*, 3 De Gex and Jones 304.

true, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." It is difficult to see any hardship or injustice in this view, or to understand why reckless and misleading statements should involve no responsibility, if their authors are too careless or purposely forbear to look into their truth. Take the common instance of a prospectus. It is surely dishonest for a man to lend his name to a string of glowing paragraphs, containing representations of fact as to which he is absolutely ignorant; and just that, when the representations turn out to be false, he should be compelled to indemnify persons who took shares, relying on his name as a guarantee for their truth. What excuse is it for a man who is party to a document stating that 30,000 shares have been taken up by the public, when, in point of fact, only 300 have been subscribed for, to say, "I did not know?" The answer is, "You ought to have known." Indeed the distinction between the active rogue, and the man who pockets his share of the plunder and asks no questions does not appear to be a very substantial one. At the same time cases of this description are plainly distinguishable from those in which representations, untrue in point of fact, are made honestly (possibly by a man who has been himself deceived) and with a *bonâ fide* belief in their truth. And this distinction may, perhaps, serve to explain some of the cases above referred to.

Mere non-disclosure of a material fact would seem, from the language of Lord Cairns, in *Peck v. Gurney*,* to form no ground for an action in the nature of an action for misrepresentation. On this point there may possibly be a difference of opinion, assuming the expression, "material fact," to mean a fact which, if known to a party about to enter into a contract, would have caused him to halt. Here, again, a general proposition, accurately expressing the law, can scarcely be framed, and much must depend on the circumstances of individual cases.

* L.R. 6, H.L. 377.

Reviewing, for a moment, the above imperfect sketch, it appears that the relations between directors of a company, and third parties are tolerably well ascertained. The only special branch of law affecting them is the law of agency, and no strain on judicial ingenuity has ever been required to adapt that law to this particular class of agents.

In proceeding further to consider what is the relation of directors to their shareholders, the difficult question arises whether directors besides being *agents*, are also *trustees* for their shareholders.

A trustee, in the proper and legitimate sense of that term, may perhaps be defined as a person who has the legal estate in property, in which other persons have the entire beneficial interest, and to whom all the doctrines of courts of equity in relation to trusts apply. Now the property of a joint stock company, incorporated as all such companies now are, is not vested in its directors, and so far from being incapable of taking a beneficial interest in the assets of their company, it is usually made an indispensable qualification that they should hold shares. Trustees, then, in the strict sense of the word, directors plainly are not: nor indeed is it usual so to style them, but they are called "*quasi-trustees*" or said to occupy "a fiduciary position."

This language, it is submitted, though sanctioned by the *dicta* of judges and the observations of text writers, is neither so clear nor so accurate as might be desired.

What is really meant in law by a "*quasi-trustee*" or "a fiduciary position"? They are doubtless familiar and convenient phrases for expressing the proposition, that in viewing the acts and conduct of one person acting for another, a court of equity will consider their relative positions and all the circumstances by which they are surrounded; and will attach weight to the amount of confidence reposed and to the opportunities of abusing it. This proposition, too, applies peculiarly to directors, since a company is a principal, which trusts its agents largely and looks but little after them.

The mass of those who take shares in a public company are ignorant of its affairs, and incapable from pressure of other business of managing, even if they understand them. Not unfrequently a large proportion of the directors share this ignorance and incapacity, and the whole business of the company is left to one or two men who may or may not be capable, and who may or may not be honest. That a Court of Equity can hardly deal too strictly with persons in whom such confidence is reposed, that it should require from them exact integrity, and forbid any side-long gains, that in short it should for some purposes, and to a certain extent, apply to them doctrines which it habitually applies to trustees, will scarcely be questioned.—Still that is no reason for calling directors, as a class, by a name which in their case imports a great deal more than is intended; especially seeing that the more popular a misapplied term is, the more likely is it to mislead. The language of Lord Westbury* in dealing with the proposition that a surviving partner is a trustee for the representatives of the deceased partners is in point. "It is most necessary," he said "to mark this again and again, that there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*—well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." Directors are not trustees, and to apply this term to them generically can only have the consequences indicated by Lord Westbury.

The truth would appear to be that the law of agency covers all the ground necessary to be covered in relation to the position of directors. To take two or three illustrations. It is the duty of an agent to give his principal the full benefit of his judgment and discretion, to keep true accounts and to

* Knox v. Gye L. R. 5. H. L. p. 676.

keep the property of his principal unmixed with his own*; an agent employed to buy goods, may not buy his own goods for his principal; † and agents have been held liable to their principals for negligence or breach of duty, in buying bad tobacco; ‡ in the conduct of negotiations for the purchase of a public house; § in doing the business of an accountant. ¶

In short, these and similar cases establish, it is believed, all that is necessary to be established for the purpose of the decisions in which directors have been spoken of as trustees. ¶ This view is confirmed by the language of Mr. Justice Story.

“It is sufficiently clear, that wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity.”**

Nothing has yet been said on the criminal liability of directors, for fraud in a prospectus or similar published statements. If persons combine, by publishing false statements which they know to be false, to cheat and defraud others, they are indictable and punishable for a conspiracy; and none the less is it a conspiracy if directed against the general public and without a view to defraud any particular individual. Moreover, the Legislature has aimed specific provisions against directors who by themselves, or in conjunction with others, thus defraud or endeavour to defraud third parties. ††

* Clarke v. Tipping, 9 Beav 284. † Bentley v. Craven, 18 Beav 75.

‡ Mainwaring v. Brandon, 2 Moore 285. § Smith v. Barton, 15 L. T. (N. S.) 294.

¶ Storey v. Richardson, 8 Scott 291, 4 Jur. 26.

¶ In Joint Stock Discount Company v. Brown (8 Eq. 381) for example, directors were held liable to indemnify their company for “breach of trust” in making an unauthorized investment of a large sum of money. Surely no reference to *trusts* was necessary to the decision in that case, and the directors might equally have been made responsible on ordinary principles of agency law. Compare Turquand v. Marshall, 4 Ch. 376.

** Story on Agency, c. viii. § 217. †† 24 & 25 Vict., c. 96, s. 84.

Smarting under losses incurred by eager or ignorant speculation, members of companies are apt, without sufficient grounds, to invoke the criminal law against those whom they assume to have wilfully deceived them. Of this, the Overend and Gurney prosecution is a notable instance. In such cases we are on the confines of civil and criminal liability, and it becomes therefore essential to bear in mind the criterion of criminal fraud, which has not always been kept in view even among experts in the law.

That criterion is *intention*. As the Lord Chief Justice told the jury in the Overend and Gurney trial :*—"Intention is everything. A guilty mind—what we lawyers call the *men's rea*—is essential to constitute a crime in the eye of the law. Misrepresentation or concealment may, as I have told you, afford matter of civil action and remedy. But you must have more than that, you must have the guilty mind, to constitute the offence with which the defendants are charged."

And again :—"In order to convict the defendants upon this indictment, you must be satisfied that there was a deliberate design to deceive and cheat the public, or such individuals of it as should lend themselves to the purpose."†

It is sometimes said that gross negligence may amount to or be evidence of fraud—a proposition which is thus dissected by Mr. Austin :

"When it was said by the Roman lawyers that negligence, heedlessness, or hastiness is equivalent in certain cases to *dolus* or intention, their meaning (I believe) was this : Judging from the conduct of the party it is impossible to determine whether he *intended* or whether he was negligent, heedless, or rash, and such being the case it shall be *presumed* that he *intended*, and his liability shall be adjusted accordingly, *provided that the question arise in a civil action*. If the question had arisen in the course of a criminal proceeding, then the presumption would have gone in favour of the party."—Campbell's Austin II., 443.

Rex v. Gurney, Finl. Rep. p. 254.

† *ib.*, p. 215.

To call negligence fraud in the present sense, would be, in truth, a contradiction in terms. If you call an act negligent, *i.e.* the result of heedlessness—you place it in a class from which criminally fraudulent acts—the result of a deliberate state of mind—are excluded. Again, it seems incorrect to say, that negligence may be evidence of fraud. Acts may be such as that, in the opinion of one person, they can only be the offspring of fraud; in the opinion of another they may be the result of mere heedlessness or rashness. In other words, an act may be evidence of either fraud or negligence, according as you do or do not collect from it *intention*, which is the gist of fraud. But the moment you have determined that an act is negligent, *cadit* the question of fraud; and *vice versa*.

The most important points relating to the liabilities of directors have now been touched on, and it remains only to add a word in conclusion. It can scarcely be said that the law has not fully recognised the responsible position of directors, or that it has not furnished a sufficient armoury against their wilful or negligent misconduct. But the inherent difficulties in using with effect the weapons furnished, can scarcely be overrated. To establish a charge of misconduct, even in a civil proceeding, is, in a complicated case, extremely difficult. In some of the worst cases, the Court is obliged to content itself with a decorous expression of surprise, or at most with a few words, of virtuous indignation. To bring home a criminal charge is yet more difficult. Moreover, the delinquents are frequently not worth powder and shot, and even when they are, those whom they have injured are seldom willing to incur the trouble and expense of an action or indictment.

It is often asked where a remedy can be found? Not, at all events, in such legislation as that inspired by the financial panic of 1866; * which provided machinery for the imposition

* Companies Act 1867, Cl. 4-9.

on directors of unlimited liability with limited liability, in the shareholders.

"It is difficult to imagine any circumstances under which a company can be advised to impose unlimited liability on its directors. The result of such a step would be to drive from the direction men of wealth and position, and to substitute in their places needy adventurers, willing, for a scanty remuneration, to run the, to them, not unfamiliar risk of complete insolvency."*

Indeed, it may be permitted to doubt the efficacy of any legislative panacea such as every aggrieved British subject carries in his pocket. People cannot be made honest by Act of Parliament, and all or nearly all that can be done by Act of Parliament to make dishonesty in relation to companies more difficult, its detection more easy, and its punishment more certain, has probably been done already.

Rather, perhaps, should attention be turned from law to what is known as commercial morality. The industry of promoting bubble companies will probably flourish so long as the more credulous portion of the public have money to part with. But a great step towards reforming the administration of those companies, which *bonâ fide* mean to carry on business would surely be made, if the principle were once recognized that accepting a directorship implies something more than the loan of a name, and that a man has no right to accept a post, the duties of which he never means to perform. To this end, the number of directors should, in most companies, be reduced, and the remuneration of the survivors increased. It is probably the general belief that the practice of requiring a share qualification for directors is something of a safeguard to the shareholders. There is ground for believing the exact contrary to be the fact. In one class of company, the promoters take very good care that the qualification shall be merely nominal: in another the holding of shares by directors is an engine for gambling at the expense of the public. If directors instead of being required to take shares, were not allowed to hold a single share,

* Thring's Joint Stock Companies, Supplement, p. 4.

the administration of most companies would be somewhat purified. Something, too, is to be said for the plan of a single managing director; giving his whole time and energies to the company, and correspondingly paid. But, apart from the difficulty of finding really competent men to undertake such posts, there is the objection—*quis custodiet custodem?*

The question, however, is really part of the whole question of commercial morality, and it may be doubted how far the prospect is encouraging. Even the periodic panics which are supposed to do good by purging out a number of unsound adventurers, and creating a healthier tone, do not seem to impress very abiding lessons. And latterly, with national prosperity advancing “by leaps and bounds,” we have heard rather too much of Manchester size, and remarkable operations of finance, to justify sanguine hopes of any immediate improvement.

II.—THE SPIRIT OF LAWS.

THIS American edition of Doctor Nugent's translation of Montesquieu* cannot fail to prove most acceptable to English readers, and it may be regarded as a proof not only of the enterprise of American publishers, but also of something vastly more important, namely, of the fact that American thought, as the country becomes more settled and developed, is steadily moulding itself upon the classical works of European literature and jurisprudence. “It seems perfectly just to make this observation, for it is not inconsistent with the admitted originality and native vigour of American literature; the observation is, moreover, pertinent to the author, for no

* *The Spirit of Laws*. By Montesquieu, translated from the French by Thomas Nugent, LL.D. New Edition. Cincinnati, Robert Clarke & Co. 1878.

one has shown more clearly than Montesquieu in his "*Esprit des Lois*," that all the parts of the human race hang together, and that modern progress advances most steadily and surely, when it builds upon the acquisitions and experiences of the past. New countries may, therefore, wisely borrow from the old.

The "*Spirit of Laws*" was the product of twenty years' anxious labour; it is, therefore, not a work to be judged of (as, unhappily, it has too commonly been judged of) by a few particular quotations, but it is a work which requires to be estimated as a whole, and with a regard as well to the circumstances of the time when it appeared as also to the design of the author in giving it to the world.

And, firstly, with regard to the circumstances of the times of its first publication. The author was born on the 18th January, 1689, and died on the 10th February, 1755; the period of his active life may therefore be roughly stated as the first half of the 18th century,—being the latter part of the reign of Louis XIV. and the entire reign of Louis XV. his successor. During this period the civilization of Europe was beginning to be carried to its highest point of perfection, and to embrace, with more or less ambition or success, all that the mind of man could grasp. The nations, both of Northern and of Western Europe, were becoming more assimilated to each other, languages were beginning to be more widely diffused, and therewith and thereby the circulation of ideas was beginning to be facilitated. Commerce was beginning to attain to an extent, a greatness hitherto unparalleled; military and naval tactics were being carried to a perfection hitherto unsuspected; and with this advance in practical affairs, the spirit of the age was becoming more adventurous in theoretical speculation and investigation. As a consequence of this wide diffusion of civilization, writers of eminent talent began for the first time to acquire an influence both in morality and in policy; the cultivated classes of society were becoming far more closely connected in this than in any other period; and great writers read in all cir-

cles, even in the highest, were beginning to guide public opinion, and their voice was becoming one of authority. These writers, though they did not directly hold a seat in the cabinet, though they exercised no immediate influence on the events of the day, nevertheless were beginning to enlarge in various ways, the circle of ideas; and in many cases of the highest practical importance they were gradually coming to direct the public mind. Statesmen and even kings during this period lived in familiar intercourse with authors; and so intimate an intercourse could not exist without influencing both the tone and the practice of policy, as well foreign and domestic. The period was also that of the decay of the superstitious sentiment and of the corresponding growth of the rational element in society,—a change which could hardly fail of proving (as in fact it proved) for the time at least to be in general for the worse. But the human race seems destined to pass through such periods of anxiety and excitement, or of suffering, in order to arrive at that better state of composure and deliberate contentment, which arises from experience and knowledge.

In such a period of beginnings and transitions Montesquieu lived and wrote. All the more potent influences which are at work in modern society were in their infancy, in their beginning. The old influences were decayed, the new influences were not yet arisen into strength or clearness. The character of French society, as portrayed in the *Lettres Persannes* of our author, happily expresses the unhappy condition of unrest which was prevailing the public mind. It was the custom of the French, he says, to treat what was serious with levity and what was trivial with seriousness; to sacrifice their understandings to their prejudices; to combine with a braggart boastfulness of liberty the most abject servility to royalty; to carry politeness in their exterior behaviour, and wolfishness in their interior sentiments towards strangers; to sacrifice to an extravagance of dress the elegance of economical attire; to disdain the useful occupations of the citizen and of the merchant; to wrangle without

sincerity or aim, to write without thinking, and judge without knowing. Such were the evils which our author exposed with equal sprightliness and energy in his letters; and for these and the like evils he essayed, in his *Esprit des Loïs*, to discover and to make known a fitting remedy and cure.

Now what remedy or cure promised to be more efficacious than one which was derived both from the nature of mankind themselves as modified by the circumstances of their existence in the social state, and from a general induction based upon the entire experience of all the various nations of the past? Philosophy and history in combination were to provide the remedy,—a combination, which although now familiar to statesmen, was a novel and original idea to our author; and in his happy conception of the mutual assistance, which those two sciences lend each other in their reflex action and re-action, consists one of his most original merits, as the pioneer of a true system of morality and policy.

Secondly, with regard to the work as a whole and the design of the author in giving it to the world.

Departing from a definition of *law* in its most general sense, as a necessary relation arising from the nature of things, a sense in which the Deity has his laws, nature its laws, the angels their laws, mankind theirs, and the inferior animals theirs also, and which is afterwards explained to mean the relation subsisting between a certain primitive reason and the different beings together with the relations of the latter to and amongst each other, he formulates the great principle, that before laws were made there were relations of possible justice; and to say that there is nothing just or unjust but what is commanded or forbidden by positive laws is the same as saying that before the describing of a circle all the radii were not equal. It is necessary therefore to acknowledge relations of justice antecedent to the positive law by which they are expressed.

But the intelligent world (meaning thereby, the human race) is far from being so well governed as the physical world. For although both worlds have their laws, which of their

own nature are invariable, the intelligent world does not conform to them so exactly as the physical world, intelligence being finite, and not only therefore liable but also prone to error. Man as a physical being is, like other physical bodies, governed by invariable laws; but as an intelligent being he incessantly transgresses the laws established by God, and changes even those of his own instituting. And being exposed to this liability and proneness to error; God has therefore reminded him of his duty by the laws of religion, and philosophy provides against the same weakness by the laws of morality, and legislation provides against it by political and civil laws.

In a state of nature the only feelings of the individual man are those of weakness and of want; but so soon as he enters into a state of society or of combination, he loses these feelings of weakness and of want; and in their stead begins to feel the contrary feelings of strength and the desire of acquisition; whence the first social condition is one of *war*, as well in their external as in their internal relations. And this propensity of the original social state wants therefore to be guided, controlled, and utilized. Whence the necessity that there is for the three varieties of human laws, namely,—the Law of Nations, the Politic Law, and the Civil Law,—the 1st variety relating to the mutual intercourse of states, the 2nd to the support of the state as a body politic, and the 3rd to the maintenance of the requisite relation between the component members of the State.

And, first, with reference to the law of nations; that law is founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, consistently with the assertion of their real interests. Secondly and thirdly, the political and civil laws of each nation ought to be only the particular cases in which human reason is applied, and should be relative to the following principal and secondary circumstances:—

(1.) The nature and principle of each Government, according as it is Republican, Monarchical, or Despotic.

- (2.) The climate and situation, and extent of each country.
- (3.) The soil of each country, and the principal occupation of the inhabitants, whether agricultural, nomadic, or pastoral.
- (4.) The degree of liberty which the Constitution will bear, and which varies with each form of Government.
- (5.) The religion of the inhabitants, and generally the inclinations, riches, numbers, commerce, manners, and customs of the country.

It is these several relations which constitute what our author calls, the spirit of laws, and it is these relations which he undertakes to examine. And with what abundance of labour and felicity of illustration does he not examine the same! and for a purpose how beneficent!

It is a common reproach to Montesquieu's derivation of laws from an examination of these relations, that it attributes everything to cold and heat. Now, if this origin were the true derivation of laws, the intentional reproach would only be an unintentional eulogy of the author, who does not despise the truthful, because to our ordinary notions it should happen to be mean. But, in point of fact, the reproach, like other similar criticisms, is unjust, as becomes at once conclusively apparent from even a slight perusal of our author's treatment of the effects attributable to climate. He says, in effect, Nobody doubts but that the climate has an influence upon the habitual disposition of the bodies, and consequently on the characters, of men, on which account laws ought to be framed that are agreeable to the nature of the climate in different regions, and *which shall also resist its bad effects*. Thus, in countries where the use of wine is hurtful, that law which forbids it is a good one; in countries where the heat of the climate inclines people to laziness, that law which encourages labour is a very proper one. It is, therefore, one of the duties and also one of the attainable ends of Government to *correct the effects of climate*; although, at the same time, it is true that the legislature ought to allow for climate, and laws as they are a bad method of changing even the manners and customs of a people, so are they a still worse method of altering the climate.

And now, in conclusion, one word for the design with which the author wrote the "*Esprit des Loix*." In the Preface, he says, "Could I but succeed so far as to afford new reasons to every man to love his prince, his country, and his laws; new reasons to render him more sensible in every nation and government of the blessings which he enjoys, I should think myself the most happy of mortals."

And again, "Could I but succeed so as to persuade those who command to increase their knowledge in what they ought to command, and those who obey to find a new pleasure resulting from obedience, I should think myself the most happy of mortals. . . . The most happy of mortals should I think myself, could I contribute to make mankind recover from their prejudices."

And, probably, in the minds of most of us the echoing answer will arise that the countrymen of Montesquieu would have been the happiest of mortals also, if they had made our author such by following his precepts, living in contentment with their government, and with themselves and others—rejoicing in that moderate liberty which he inculcated as the most convenient for human nature.

As regards the style of Montesquieu, its elegance has sometimes been supposed to detract something from its vigour. But, in our opinion, this is a mistake, and perhaps no other style could have secured for the subjects treated of one-half of the universality of reception which they have received, and which it was necessary for their utility they should receive, amidst persons of politer character and station. It is possible from these writings to imbibe a nobility and manliness of taste, a dignity of sentiment, and a refined conception of civil liberty, which are at once the requisites for and the certain causes of public distinction, usefulness, and admiration. Lord Chesterfield, no mean teacher of the avenues to success in life, has said of Montesquieu, "His virtues did honour to human nature; his writings, justice. A friend to mankind, he asserted their undoubted and inalienable rights and liberties, even in his own country, whose prejudice in matters of religion

and government he had long lamented, and endeavoured (not without some success) to remove. He well knew, and justly admired, the happy Constitution of England, where fixed and known laws restrain Monarchy from tyranny, and liberty from licentiousness. His works will illustrate his name, and survive him as long as right reason, moral obligation, and the *true spirit of laws* shall be understood, respected, and maintained."

ON THE LAND TRANSFER BILLS.*

BY GEORGE SWEET.

WHETHER we shall regulate the sale and transfer of land by a public registry, either of assurances or of title, has ceased to be an open question. The energy with which the Land Transfer Bill has been revised and passed through the preliminary stages, and its favourable reception by the House of Lords, justify the expectation that either in its present or some modified form it will become law before the session closes, unless it is previously shown to be impracticable or irremediably defective. From mere inertia it has nothing to fear. Many conveyancers thought that the Bill of 1873, notwithstanding its grave defects, could be made the basis of a working measure, and that opinion is now sanctioned by the great authority of Sir Charles Hall, who has allowed his name to be associated with the revised edition of the Bill.

We have now for the first time a measure of registration of title for England, which has been critically examined and virtually guaranteed to be sufficient by a conveyancer of acknowledged ability and great and varied experience. In dealing with a subject so purely technical it would perhaps

* Read at a Meeting of the Law Amendment Society on the 4th inst.

be the wisest course to rely upon the character and responsibility of the distinguished lawyer to whom its revision has been entrusted, and to pass the Bill precisely in the form which he shall approve, after considering any criticisms and suggestions that may be made. It must not be assumed, however, that all, or a majority of those on whose opinions the fate of the measure depends, will take this view, nor would it be safe to act on it without knowing more than we do of the restrictions and conditions under which the revision was effected. It may be that Sir Charles Hall did not wholly approve of the principle of the Bill, but said, "If you must have a registry of this kind, these are the provisions which I think essential." We should not, then, allow our belief in the vitality of these Bills, to set aside altogether the inquiry whether they contain the germ of the best possible reform, and, if they do not, whether the passing of them would materially delay the establishment of a preferable system; and if we think that the Bills should pass, we may still help by discussing, to improve them.

There is, perhaps, some misunderstanding as to the origin of the principal Bill. It is, as we know, a freely-amended edition of the Bill which the late Lord Chancellor brought forward a year ago. Nevertheless, it is much more Lord Cairns's Bill than Lord Selborne's, for Lord Selborne's Bill was in substance, and as to many of its clauses, literally, the same as the "Transfer of Land Bill" brought forward by Lord Hatherly in 1870, and that was fashioned out of two Bills introduced by Lord Chelmsford in 1862, entitled "Land Estates Bill," and "Registry of Landed Estates Bill," with the modifications necessary to substitute for the Landed Estates Court contemplated by Lord Chelmsford's Bill, the less alarming machinery of a registrar, acting under the control of the Court of Chancery. Lord Chelmsford's Bills, brought forward in opposition to the fatally original Bill of Lord Westbury, which became an Act and a dead letter, were mere reprints of Bills previously introduced by Lord Cranworth, and those were copies of the original Bills

brought into the House of Commons by Lord Cairns when Solicitor-General in 1859.

It will be convenient to you that I should preface my observations on the principal Bill with a brief abstract of its provisions. I should prefer to pass over those relating to registration with a certified title, whether absolute or limited, because experience has confirmed the anticipation of conveyancers that there never can be an appreciable demand for certified titles. No man in possession of an estate becomes uneasy as to his title unless he has some grounds for doubt, which would make him avoid rather than court official investigation. No intending seller or mortgagor has any motive for obtaining an official certificate of a title which he can prove with much less delay, trouble, and expense, by evidence produced directly to the purchaser or lender himself, for it is now known that the addition of a Parliamentary title adds little or nothing to the marketable value of an estate. It is true that in Ireland the Encumbered Estates Court during some few years sold encumbered estates to such advantage that, as unencumbered estates were then beyond its jurisdiction, people mortgaged upon purpose, because they would go thither. But that was a transient mania or fashion which fell upon the English and Scotch capitalists and farmers, to whom a large field of enterprise was suddenly opened in a country the laws and usages of which were comparatively unknown to them. In England, although a few titles certified under Lord Westbury's Act are occasionally offered for sale, no marked preference for them has been shown. The expense of procuring an official certificate, whether absolute or limited, must necessarily be greater than that of satisfying a purchaser, that for him the title is as it would be certified, because the purchaser only investigates for his own safety, and shuts his eyes whenever he knows that he can safely walk in darkness, while a public examiner of titles insists on looking into every corner in order that he may protect, not future purchasers, but all possibly existing interests within the proposed limits of investigation.

The backbone of the measure is the provision intended to secure a record of future dealings with, and devolutions of titles to land. If such a record had been kept during the last sixty years, we should not now be talking of limited titles or of official or any other investigation of titles.

For the convenience, however, of those who attach a value to certified titles, and desire to discuss the question, I may say that the Bill contains provisions intended to enable the registrar, if satisfied after proper investigation that it is so, to certify that an applicant is entitled to a given subject of ownership with a title, as the case may be, either absolute or limited. But as the language in which the intention is expressed does not seem to me to be quite appropriate, I will give you the words of the clauses; and I ask your attention to them because they apply also to uncertified titles and to compulsory registration; in short, to all registered titles.

The 23rd section* says:—

“Upon every registration under this Act the registrar shall enter in a book to be called ‘The Land Register,’ the name of the proprietor and a description of the land, with a reference, when necessary or convenient, to a map or plan thereof; and if the registration be with a title absolute or limited, he shall state thereon whether it is absolute or limited, and if limited what is the limit, and, whether absolute or limited, the particulars of all prior estates, leases, and incumbrances (other than such interests as are declared by this Act not to be incumbrances) to which the land or any part thereof is subject; but no trust, express, implied, or constructive, shall be entered or referred to in ‘The Land Register,’ nor shall it be shown that the proprietor is mortgagee or has a security only.”

By an absolute title is here meant a Parliamentary title, free from every estate, interest, and claim, which is not particularized on the register as a deduction from the absolute ownership in fee simple in possession, except those tenancies, easements, and public or local charges and interests which are not deemed incumbrances—(s. 37.)

* The references throughout are to the clauses of the un-amended Bill, with reference to which the paper was written.

The effect of registration is thus defined (s. 36) :—

“The person registered as proprietor of land shall have an estate in fee simple therein, together with all rights, privileges, and appurtenances therewith enjoyed or thereunto belonging or appurtenant, free from all rights, interests, claims, and demands whatsoever, including any right, claim, and demand of her Majesty, her heirs and successors, except and subject as follows, that is to say :—

1. “If the registration be as proprietor only, except and subject to any adverse estate, interest, or title subsisting in or to the land at the date of the registration.”

2. “If the registration be as proprietor, with limited title, except and subject to any adverse estate, interest, or title subsisting in or to the land at the date mentioned upon the register, and the rights of all persons interested under or by virtue of any such estate, interest, or title.”

3. “Whether the registration be as proprietor with absolute or limited title, except and subject to the prior estates and incumbrances, if any, entered on the register, and to any power of re-entry, shifting clause, restriction, or condition, notice whereof shall be entered on the register, and to all such charges and interests as are by this Act declared not to be incumbrances.”

“Provided that all such prior estates, titles, rights, incumbrances, charges, and interests, may at any time be barred or extinguished by any statute of limitations or otherwise, as if this Act had not passed.”

It appears, therefore, that the certificate of a limited title can only be a certificate of a title free from all estates and interests which were not subsisting at the date mentioned on the register ; so that the registered proprietor with limited title will have an absolute title to what remains of the fee simple after deducting the unknown estates and interests which may have been subsisting at the specified date ; but as to all such of those estates and interests, as may have since been got in, and proved to the registrar to have been got in, he will have no parliamentary title. It follows that the word “title” in the expression “title absolute” has nothing in common with its meaning in the expression “title limited” as those expressions are used in the Bill. “Absolute title” means ownership, free from all unspecified claims ; “title limited” means, as experienced conveyancers—but I

fear few others—will readily see, nothing more than this, that the registrar has investigated the title from the specified date, and has found no adverse interest save those that are specified. It does not guarantee to the registered proprietor a title free from any of those estates and charges from which the registrar has ascertained that it is free, if they were subsisting at the specified date.

The next subject is the provision contained in section twenty-eight, which is intended to compel registration, and is to this effect—that, after three years from the commencement of the Act, a conveyance of land upon a sale shall operate only in equity, until some person is registered as proprietor under the conveyance. This the Lord Chancellor describes as a mild kind of compulsion. It is not only mild but grotesque or inappropriate, and from the purpose of registration, which is to tell a purchaser all he is concerned to know. Under the working of this clause he may ask what title he shall get, and for answer be told that the legal estate may have been out of place during half a century. The appropriate and sufficient provision is the familiar one—that the first registered disposition shall prevail.

The compulsion has probably been made mild from fear that to require registration of all dealings with land under penalty of loss of priority would bring an unmanageable amount of business to the office, or impose an unreasonable burden upon persons interested in land. It is unlikely that the provision, as it stands would have much compulsory effect. It leaves untouched all dealings with land, except sales (and a sale is not defined). Settlements and wills may go on dealing with the legal estate for centuries without registration. An unregistered conveyance after a sale is not to lose its priority, but is to operate in equity only. As this denial of legal effect applies to all conveyances after a sale, whether made to the purchaser or to others, and the only person who, after a sale, can be registered as proprietor, is the one who is or represents the equitable owner under the sale, a purchaser who omits to register his conveyance incurs

no risk of loss, and exposes himself only to the inconvenience of having to take legal proceedings in another name—an inconvenience which, under the Judicature Act, would probably be imperceptible. Moreover, the penalty can be absolutely evaded by the execution, before the sale is completed, of a conveyance to the purchaser in trust for the vendor, or a mortgage to the purchaser. Under any view the limited scope of the compulsion is a grave defect. If, for a considerable time after the opening of the register many estates continue to be dealt with by unregistered assurances, the intention of the Act will fail. If only a few of such unregistered titles are left to be dealt with as heretofore, they will crop up from time to time with accumulated complications to the confusion of practitioners unversed in the old traditions. It would be as if Mr. Brodie, instead of annihilating all defects in past fines and recoveries, had left them to perplex or betray the unlearned through another half century. I think there cannot be a doubt as to the expediency of substituting for the twenty-eighth section a provision that, after the lapse of sufficient time to get the office into working order (a year would be ample), no disposition of an interest in land should prevail against a previously registered title, or operate to pass the legal estate. It is of essential importance that this amendment be made in the Bill. If it is not done now it will never be done. The mild compulsion would be sufficient to save us from having, as we have under the Act of 1862, an expensive establishment with nothing to do, and no next friend of the owners of the unregistered titles, or of possible purchasers from them, will take trouble enough to overcome the inertia of Parliament, or to answer the ready statement that the measure is working well, and will in a few years work better of itself. It has been suggested that under a compulsory registration upwards of a thousand documents *per diem* would be brought to the office. I believe that there are no trustworthy data for such an estimate; but, if the business is to be done at any time, there can be no difficulty in organizing, in the

course of three years, a sufficient establishment to meet all possible demands upon it. Local registries should be opened at once. The operation of the compulsory provision might be limited until the lapse of two years to conveyances on sales, then extended to mortgages, and after the lapse of four years to all dispositions intended to have priority or to pass the legal estate. After careful consideration I think that no person interested in land would be materially inconvenienced by such a provision.

Land once on the register is to be dealt with by means of the register; but a caveat against the first entry of the land on the register (s. 29), a caveat against dealing with land which has been registered (s. 37) may be lodged with the registrar on the strength of an affidavit of interest. The effect of the caveat is to entitle the cautioner to notice of any proposed entry of or dealing with land on the register, which is to be delayed for a time sufficient to enable him to obtain an injunction from the judge or court having jurisdiction, if he can show his right to it.

Confining our attention to fee-simple titles, the person who may bring land upon the register is he who, as the law stands, could by an ordinary or enrolled assurance, alienate the fee simple (s. 5). By this is meant, where a certified title is not required, either the person who makes out a *prima facie* title to the satisfaction of the registrar (s. 9), or one who, after three years from the commencement of the Act, produces a deed of conveyance to himself, as upon a sale. I may remark, in passing, that since a conveyance upon a sale is easily manufactured, it would be simpler, and better to allow the registration of an uncertified title upon any application, without inquiry, as is now done in English and Irish registries, and I believe also in Scotland.

The title of the registered proprietor is to be "subject to any power of re-entry; shifting clause, restriction, or condition, whereof notice shall be entered on the register" (s. 36). This seems to render possible the statement on the register of a very complicated title, and to be inconsistent in spirit

and even in terms with the provision that a mortgagee (who holds an estate on condition) shall be registered as proprietor without mentioning on the register that the transaction is a mortgage (s. 60). I beg attention to this clause, because it seems to contemplate even a greater variety and complexity of entries on the register than would be necessary to provide for the complete registration and protection of every possible estate and interest under the plan, to which I shall presently refer.

A mortgagee can only be registered as proprietor with the consent of the mortgagor, which in the case of a mortgage executed after the commencement of the Act, is to be implied if not expressly negatived. But in no case is notice of the character of the registered proprietor as mortgagee or trustee to be entered on the register.

Except by authority of the court, it seems that no trustee who has not a power of sale can be registered if any beneficiary is not in existence and *sui juris*, or does not consent. Here again is a provision which may leave certain titles unregistered during an indefinite period.

The list of legal estates and interests in land which may be recognized after registration of the title of the fee cannot be better given than in the words of the Bill (s. 42) :—

“ Subject as the estate of the registered proprietor is to be subject, in manner aforesaid, there shall be only the following estate and interests in land or in rent of which respectively there shall be a registered proprietor.

(1) “ The fee simple in a registered proprietor of land.

(2) “ The fee simple in a registered proprietor of a perpetual rent, and the powers and remedies for recovering the same, and such proprietor's power of re-entry, if any, upon the land.

(3) “ Leases of which there shall be registered proprietors.

(4) “ Tenancies which are, as aforesaid, not to be deemed incumbrances.

(5) “ Easements and incorporeal rights created under the power in that behalf herein contained, and of which notice shall have been entered on the register.

(6) “ Estate of tenant in dower of which there shall be a registered proprietor.

(7) "Estate of tenant by the curtesy of which there shall be a registered proprietor.

(8) "The estate or estates vested in the person or persons deriving title by descent or devise, and in whom the legal estate shall, under the provision in that behalf hereinafter contained, be vested in the interval between the death of a proprietor and the entry on the registry of another proprietor."

"And all other estates, rights, titles, and interests shall be equitable only."

No trust, equity of redemption, or equitable right, title, interest, or *lis pendens*, is to affect a purchaser from the registered owner, though cognizant of the adverse interest.

After the first registration of title to land, dealings with it not on the register confer equitable titles only, defeasible, as we have seen, by alienation for valuable consideration by the registered owner.

I shall not detain you by any statement of, or observations on, the provisions with respect to estates in dower or curtesy, which are new, and seem to have been well considered, though they are open perhaps to a little verbal criticism.

The registered proprietor is absolute owner, subject to any estates and interests which existed before the land was first put upon the register and are not barred by the registrar's certificate, and also to such adverse estates and interests as are allowed to be noticed, and are noticed on the register. These are such as exist when the proprietor is registered with a certified title, and leases, estates by the curtesy or in dower, and charges of principal money or annuities, with or without a power of sale; but in every case the registered proprietor of a charge is entitled (subject to the rights of prior incumbrances) to take possession of the land if any money due to him is not paid.

The registered proprietor is entitled to demand a land certificate, being a transcript of the entry of his title on the register.

Deposit of the land certificate with a stamped memorandum of charge, creates a charge without registration, and stops all further charging on the register, unless the certificate is pro-

duced. No other deposit will create a charge on registered land. It is for mercantile men to say whether they can go on without liberty to raise money for emergencies on deposits free of mortgage duty. The provision will be an inducement to keep land off the register. There is also a provision that no lien for unpaid purchase-money shall exist on registered land. I have not discovered the reason for this.

The registered proprietor of a charge is to have absolute dominion over it. That is to say, trusts of the money are to be kept off the register.

I may at once observe that the provisions for securing charges, together with the provision (s. 125) that no priority shall be gained by tacking a charge or equitable interest to the legal estate or to a legal charge, though perfectly logical and symmetrical from a lawyer's point of view, will work mischief if their operation is not restrained by a law, like that which prevails in Hamburg and Mecklenburg, and probably in some other German states, though not in Prussia—a law which does not allow the same parcel of land or subject to be mortgaged to several persons in succession; so that if the owner of a mortgaged estate desires to raise more money upon it, he must either borrow the money from the present mortgagee, or pay him off, or persuade him to release part of the estate from the debt. Our rules of tacking and consolidating securities, anomalous and absurd as they are from one point of view, have the great merit of discouraging in England the practice of lending money on second mortgages. I will repeat here some remarks which I made some years ago on this subject. In the matter of facilitating charges on land we may learn from the experience of Ireland. The registry and system of judgment liens there, gave, in a clumsy manner, those facilities of multiplying charges, and holders of charges, for which this Bill is intended to provide more efficiently. What was the consequence? Charges on land to the last shilling of its value, redemption hopeless, the equity of redemption valueless, the nominal owner indifferent to the condition of his exhausted inheritance, the charges divided among

so many incumbrancers, each antagonistic to those in priority to him, so that all who had a substantial interest in the cultivation and welfare of the estate were destitute of any authority over it. Concert in a system of management was almost impossible, and at length Hercules was invoked, and appeared in the shape of the Encumbered Estates Court. It is the difficulty of restraining the growth of puisne incumbrancers on registered land that has been the main objection with many thoughtful lawyers to a registration of title. For a further development of this view I may refer you to Mr. H. R. Droop's paper "On certain beneficial Effects of the Rule of Tacking," read before the Juridical Society in July, 1862, and published in their "Transactions."

It is provided by section 78 of the Bill that on the death of a sole proprietor, or the survivor of several, the real representative appointed by his will, or if he appoints none, by the Court, shall be registered; in the meantime the estate shall devolve at law as it would have done if not registered.

I have already mentioned the provision for a caveat entitling the cautioner to notice of an intended dealing with land on the register. There is a further provision for an inhibition to be issued by the court on the application of any person interested, "inhibiting for a time, or until the occurrence of an event, to be specified in the order, or generally until further order, any dealing by the registered proprietor with any registered land, lease, or charge" (s. 91). There is also, in section 102, a provision for an entry in the nature either of a caveat or of an inhibition, on the application of the registered owner, at the registrar's discretion without the authority of the court. There is also power, in the case of joint owners, to enter a restraint on alienation, except by order of the court, when the number of joint owners is reduced below a specified number.

The provision in section 117 for cases where a title to, or interest in registered land has been acquired by adverse possession or enjoyment, seems to be insufficient. It gives authority to the court to order a rectification of the register

after a court of competent jurisdiction has decided in favour of the title so acquired. But this may never happen, because the person in possession cannot obtain the decision of a court unless his title is disputed. The provision in the Bill of 1873 seems to be preferable, but it would be better still to allow any adverse title to be entered as a claim, which may in time become a registered title, in the manner I shall presently explain.

You will have seen that the Bill provides for the registration of the absolute ownership in fee, of a leasehold title, and of a title in dower or by the curtesy, subject or not to charges and conditions of certain kinds; but it does not allow of the entry of notices of a trust or duty, or of any qualification of the absolute power of disposition, except those which I have mentioned. Now when the registered proprietor is a trustee or mortgagee, it is essential to make some provision for giving notice to purchasers, and to the registrar, that the registered ownership does not carry with it the unlimited powers of disposition which belong to a beneficial owner. The trustee or mortgagee must be registered as trustee or mortgagee, and the Act must define the powers of disposition which will be incident to his ownership so qualified, subject to any qualification or enlargement stated in the register. Otherwise a trustee might settle the trust estate on his marriage, and there would be no relief against the objects of the settlement, as I read the provision of section 124, which preserves the equitable jurisdiction to give relief against fraud—a section from which, I may observe, some words seem to have dropped out. Notice of an equitable estate is not fraud.

Having endeavoured to give you a general notion of the scheme of registration embodied in the Bill, I have now to point out what I consider to be its principal defect—a defect, as I think, of great moment, but easy remediable. It is, that provision is made for a false instead of a true statement of title. The object of the Bill, upon which I assume we are agreed, is to establish a record of title. A record of title differs from a record of title-deeds, as a statue differs from

the marble block out of which it has been cut. The one is the perfect work cleared from the rubbish of the workshop, the other is the rude mass of materials upon which the artist has not yet operated.

A perfect record of title should show the state of the title at the date of the last entry on it, and it should show nothing more. But for different purposes in respect of the same property or title, information differing in particularity or kind may be required. There is no difficulty in providing a record of title that shall, for whatever purpose it may be consulted, yield to each applicant the kind and amount of information he needs and is entitled to, and nothing more. Let the purpose be the purchase of the fee. What is the ultimate result of the labours of a purchaser's solicitor and conveyancer upon the investigation of the vendor's title? The cream of it is contained in the last words of the conveyancer's last opinion, "I am of opinion that a good title, according to the contract, is shown in A and B, with the concurrence of C and D." The conveyance drawn upon this opinion may be in these words, "A and B, with the consent of C and D, for £———paid to A and B by E, convey Clay Farm to E and his heirs." With respect to every subject of ownership we can say, if we know the title, that some person or persons *in esse* or *posse* could make a perfect title to it. When the concurrence of several persons is necessary, we can generally classify them so as to say that the ownership or power of disposition of the fee is vested in one or more of them, either absolutely or subject to some more limited interest in the other or others. Let us call the limited interest a charge. For the purpose of ascertaining the necessary parties to a perfect conveyance it is sufficient to know who can dispose of the property subject to the charge, and who can release the charge. An entry on the register, therefore, that A and B are owners of Clay Farm, subject to a charge in C and D, will give to a purchaser all the information he needs for the purpose of his purchase. If the first entry of the title on the register is not of sufficient antiquity,

he must investigate the earlier title according to the method now in use. For the purpose of the sale it is unnecessary to define the interest of C and D. It is sufficient to describe it as a charge. If it can be compendiously particularized, as in the case of a lease, a mortgage, an annuity, &c., the reference to it will be more descriptive.

But the interest constituting the charge is itself a subject of ownership, and is to be so entered on the register for the purposes of alienation. It is distinguished by a symbol of figures or letters, and identified by a reference to the document which has created it, as thus :—"Charge F Z. 47, created by instrument, so marked, dated 1874," the instrument or an authenticated copy being deposited in the office.

Notices of interests, which are placed on the register without the consent of the registered owner, may be divided into two classes—*notices* and *claims*. A notice is an intimation that a person who gives his name and address desires to have notice of any intended disposition of a given subject, and a short delay sufficient to enable him to communicate with the proposed transferees, or to apply to the Court for its interference.

A claim is an assertion of a title or interest, more or less adverse to the registered title, to which all persons dealing with the registered owner are bound to attend. The costs occasioned by an unfounded claim will be paid by him who registered it. A claim well founded and supported by evidence of enjoyment (as a claim of title by adverse possession under the Statute of Limitation or by prescription), will, when it is established to the satisfaction of the registrar, be registered as an ownership. All details respecting the claim (with which a purchaser will have no concern, if the claimant concurs in the sale), may be set out in a separate document deposited in the office, to be referred to in case of need. Now under one or other of these four kinds of entry on the register—*ownerships*, *charges*, *notices*, and *claims*—every kind of interest in land may be represented and protected on the register without presenting any further impedi-

ment to alienation than the actual state of the title requires ; and I venture to suggest, that the Land Titles Bill should be amended so as to provide for the entry of notices and claims without any restriction. For a more detailed explanation of this scheme (which is that of the late Robert Wilson), I may refer you to a paper on "Impediments to the transfer of land," read about a year ago before the Juridical Society.

One of the most formidable objections to a general register of titles is the expense which, it is suggested, it would occasion in small transactions. I believe that there is much exaggeration in what has been said on this point, and that it would be easy to provide for the registration of small purchases without any additional expense. Those who desire the luxury of a certified title may fairly be required to pay for it, but the cost of the mere registration of current transactions for the benefit of posterity, should be paid out of the Imperial revenue ; but I will not detain you by dwelling further on this part of the subject.

The Real Property Limitation Bill and the Real Property (Vendors and Purchasers) Bill are included in the notice for this meeting, and are before you for discussion. I think they will effect substantial improvements in the law. I shall not trouble you with any observations on them beyond this, that the 7th sub-section of the 2nd section of the Vendors and Purchasers Bill appears to be incomplete, inasmuch as the defect of title created by the existing Registry Acts in the case of a devise by a bill which is not registered within six months after the testator's death, is declared not to be such a defect as a purchaser can insist on, but is notwithstanding left to be in substance as much a defect as it has hitherto been.

IV. THE ADULTERATION OF FOOD ACT, 1872.

THE practice of adulterating articles of food and drink, and drugs for sale, in fraud of Her Majesty's subjects, and to the great hurt of their health and danger to their lives, which, according to the Preamble of the Act of 1872, necessitated more effectual laws for its repression, appears, if we may judge from the evidence taken before the Committee of the House of Commons now sitting, to have very slightly diminished. That an Act of Parliament which required six years to consider, should in less than two years be found to be practically inoperative, is certainly most unsatisfactory, and we think that some inquiry into the reasons for its failure will be found interesting to all law reformers.

The first great fault in the enactment is that it is, in effect, entirely permissive. Nothing can be done until analysts have been appointed by the local authorities, who are not compelled to make such appointments without an order from the local Local Government Board in England, a Secretary of State in Scotland, or the Lord Lieutenant in Ireland. Now, local authorities, being generally comprised of manufacturers and others who may fairly be supposed to have a certain amount of fellow-feeling with the compounders of adulterated articles, have not been specially anxious to enforce a disagreeable Act of Parliament against their friends and supporters, and therefore have not appointed analysts. From the evidence of Mr. Owen, of the Local Government Board we gather that a "large number of boroughs and some counties have not appointed analysts, and that the Local Government Board have also not put their compulsory powers into force." Mr. Owen tells us there are different modes of paying analysts: in some cases they are paid by salary, the minimum being £50, and the maximum £150, they are also paid partly by salary and partly by fees. The remuneration being so low, we are not surprised to learn

that a considerable difficulty has been sometimes experienced in getting competent persons to discharge the duties. It is no doubt also true that there is a difficulty in judging of qualifications, but we cannot admit that the expense of providing such remuneration as we have quoted, should be held a sufficient excuse for the local authority refusing to appoint an analyst. We are sorry to see the Local Government Board deterred from action by paltry and trivial excuses. Difficulties no doubt exist, but these difficulties can be surmounted. Whether the Board, with its enormous pressure of other important duties, is the best authority to deal with the Adulteration Act is another question which we shall shortly consider.

Before endeavouring to suggest amendments of the law which would meet the existing defects in the Act, it may be well to recall to our minds the importance of adulteration as affecting the poorer classes, especially. We advisedly direct attention to the poor. The rich man can protect himself to a considerable extent, but the labourer, compelled to go to the cheapest market, with a vitiated taste from early acquaintance with adulterated food, does not know and therefore does not estimate, the relative value of pure and impure food. He drinks his beer adulterated with liquorice and grains of paradise : in his pipe, he smokes contentedly, rice, lampblack, and coloured tobacco. If he is a teetotaler, he upsets his digestive organs with lemonade containing copper or lead ; or gingerbeer made attractive with capsicum, iron, and cream of tartar. His wife prepares for his tea a decoction of willow-leaves Prussian blue and rice husk, spreads his alum made bread with butter laden with water starch and animal fats, or as an exceptional treat gives him some "real fresh Dorset," made from rancid butter washed in Condyl's fluid. His children's cocoa is luscious with ferruginous earth, brick-dust, and red ochre, their ha'porth of sweets is coloured with antimony, arsenic and lead oxide, while the baby is starved on milk and water. This is no imaginary sketch—the facts have been proved before the Committee of 1856, and yet while our

traders are sowing around us disease if not death, we listen with patience to dealers who complain that their only process against manufacturers is by "disturbance of the amicable relations which exist between them and the wholesale firms in the disagreeable form of an action at law." Whatever the trading community may think we trust that the general sense of the country will continue to be that the uttering of false goods is almost in the same category as uttering false coin, and that we shall not fall behind France, Prussia, Spain, or Holland, in endeavouring to restrain mercantile frauds which taint public morality and lowers our commercial character abroad. Perhaps one of the greatest difficulties with which the authorities have to deal is the manufacture of articles which it is said in the interests of the public require an admixture of foreign substances. For example, it has been considered hard that vendors of mustard, made precisely as in our Government Victualling Yards for the Royal Navy, should be prosecuted. The admixture of turmeric and flour in certain proportions is said to increase the flavour of the mustard as a condiment, to improve its appearance while in use, and to preserve it, when mixed, from rapid deterioration. Admitting these statements to be correct, they would point to the recognition by the state of certain known admixtures which should be registered and approved by a public department, and the fraudulent departure from which should alone be liable to prosecution. It would be then necessary to have a central board of competent analysts to whom all such questions should be referred, and whose decision in these and other matters should be held to be final. There are many other objections to the Act, but we venture to summarise the principal as follows :—

1. That its adoption is not compulsory, but, within certain limits and practically, permissive.
2. There is no definition of adulteration. But the introduction of anything which alters the nature and quality of a food or drug might be held to be an adulteration.
3. That it is doubtful whether knowledge on the part of

the seller, that the articles are adulterated is necessary, or whether, under Section 2, the sale alone as unadulterated of an article which is adulterated, is *per se* an offence, without imputing guilty knowledge.

4. That there is no power to enter manufactories and take samples of the goods manufactured, nor to prosecute the manufacturer.

5. That there is no sufficient guarantee for the appointment of properly qualified analysts, nor for their proper remuneration.

6. That the lowering the quality of an article by taking from it some of its essential parts, as for example abstracting the cream from milk, if there is no introduction of any foreign matter, is no offence.

7. That the officers appointed are not independent of the local vestries, that they are soon known, and are not under adequate supervision.

8. That the application of the penalties in the metropolis to the funds of the police, and not of the local authorities, thereby throwing the expense and odium on the latter, while the gain is to the former, prevents the vestries from putting the Act in force.

9. That there is no power to register admixtures, which for general use are superior to the pure article.

We believe that amendments in these points would be of advantage not only to the consumer but to the honest trader. The success of the Civil Service Co-operative and similar stores has been due, not so much to the cheapness of the goods sold, as to the belief which has gained ground amongst the public that the articles supplied are pure. Once re-establish the faith in universal purity at a fair price, and we are fully assured that the public estimation of the convenience of retail trading at shops would soon tend to direct trade into the old channels.

The true system to check adulteration efficiently, it appears to us, is to place the prosecutions in the hands of public officers responsible to the State alone. In New York, there

exists a special body of Police, called the Sanitary Company, who have the advantage of a Medical Board to assist them, whose duty it is, to do all the duties of Inspectors of Nuisances in England, to inspect steam boilers, and to act as School Board Officers. A similar body of educated men attached to every Police force in England, might safely be entrusted with the carrying into effect an amended Adulteration Act. They would be under a discipline and control which no local authority can exercise over their few men. They would cost less, as each separate sub-division has now special expenses of its own, they could command the services of competent and well-paid analysts possessing special diplomas, and they might be shifted from place to place so as to be free from local influences, their powers of detection being thus greatly increased. Finally they would be easily accessible by the general public, who now are frequently ignorant of the whereabouts or existence of the nuisance inspector, but who as a rule make their complaints in any and whatever difficulty at the police station.

We cannot conclude this brief article without expressing our indebtedness to the *Anti-Adulteration Review* for many valuable hints and practical suggestions on this important subject.

A. HERBERT SAFFORD.

V.—HISTORICAL SKETCH OF THE LAW OF PIRACY.

By A. T. WHATLEY, B.A.

AMONG the ancients piracy was almost the only international maritime relation. So far from being a disgrace, and an illegal occupation, it was considered an honourable calling, and looked upon much in the same light as deeds of arms in the days of chivalry. We find the Homeric heroes boasting of actions which in later times would have

sent them to the gallows.* On the arrival of strangers the question "are you pirates?" is asked quite as an ordinary thing, and as implying rather a compliment than otherwise.† Thucydides, in his preliminary sketch of Greek history,‡ alludes to the prevalence of piracy, adding "for they were not as yet ashamed of it;" by the words "as yet" he implies that in his own day people had begun to look upon it with disfavour. The enterprise of the Phœnicians first showed how resources might be developed by commerce: and as commerce increased, it was inevitable that attempts should be made to suppress piracy. Minos, we are told,§ put down the sea rovers, so that he might safely get in the revenue from the islands which he had subdued; islands which had themselves formerly been the strongholds of pirates,¶ probably because their rocky surface was not sufficiently large or productive to support the inhabitants in the ordinary way. We are told that Solon legalised certain piratical associations which then existed, though he imposed on them certain regulations and restrictions.** But such an inveterate habit could not quickly die out: it found too congenial a home in the rude nature of semi-civilised men; and too many opportunities in the thickly scattered isles of the Mediterranean.

In a treaty made after 509 B.C.,†† between the Romans and the Carthaginians, the latter undertake not to sail beyond Pelorum for commerce, or for piracy.

As international relations of a more amicable and civilised character grew up, the necessity of protecting commerce began to be acknowledged; and a general feeling spread abroad that piracy was—if not less honourable—at least, more objectionable than it had formerly been held to be. The same feeling also led to the better protection of ship-

* Hom. Od. ix. 40. † ib. iii. 70.

‡ Thu. i. 4.

§ ib. i. 10.

¶ ib. i. 8.

** Wheaton's Hist. of Inter. Law, p. 2. I have not been able to find an older authority for this statement.

†† Polibius iii. 24-4. See Spelman, Glossar, sub. voc.

wrecked men and goods.* The vitality of the old offence was shown in the case of the Cilicians, against whom Rome, the mistress of all seas but the Cilician, had to send no less a man than Pompey, with powers almost unlimited over the whole Mediterranean, and over the coasts to a distance of 400 furlongs from the sea.† Cicero thus described the state of affairs—"Quis enim toto mari locus per hos annos, aut tam firmum habuit præsidium ut tutus esset, aut tam fuit abditus ut latere. Quis navigavit qui non se aut mortis aut servitutis periculo committeret, cum aut hieme aut referto prædonum mari navigavit! cui præsidio classibus vestris fuistis?"

Rome, like Athens, when she became very great, was dependent on a foreign corn supply; and so, fortunately for the maritime interests of the world, she was most deeply interested in the extirpation of the pirates who intercepted that supply.‡ Yet we find in the Digest but few cases of laws or rules for the regulation of navigation: piracy seems to be regarded as a necessary evil, and where it is alluded to, it is only some minor question that is raised, *e.g.*, 'how losses caused by pirates are to be apportioned among the ship's company, or how goods recovered from pirates are to be restored to the owner.§ Cicero has left us a clear condemnation of piracy, perhaps the earliest that we can find:—"Pirata non est perduellium, sed communis hostis omnium; cum hoc neque fides debet nec jus-jurandum esse communis."

Turning to the Middle Ages, we find piracy again rampant. After the downfall of Imperial Rome, when no other power

* Pardessus i. 79.

† De lege Maniliâ.—At their head quarters on the Coast of Cilicia the pirates had built dockyards and arsenals, and established something like a government; it was almost like a return to the Homeric times: for Piracy began to be embarked in as a sphere of honourable enterprise, by men of wealth and station."—Merivale, I. 40.

‡ "Colophonem aut Samum, nobilissimas urbes, innumerabilesque alias, captas esse commemorem, cum vestros portos, atque eos portus quibus vitam et spiritum ducitis in prædonum funisse potestate sciatis?"—Cicero de lege Maniliâ, 38.

§ De Off. iii. 107.

was sufficient to keep order on the waves, the natural tendencies of the dwellers by the Mediterranean again showed themselves, and the development of commerce was checked by the depredation of innumerable swift and daring galleys. In an age when petty wars were laying waste every country, "times of great struggle and disorder all Europe over, and the darkest period of times,"* when an established sovereign could not keep peace among his own people, it was impossible that any one should be able to chastise the robbers of the sea, or restrain their incursions. But when order began to be established on land, and sovereigns were more firmly settled on their thrones; when the necessities of an increasing and a more refined population developed commerce in spite of the many obstacles—then limits were gradually set to the impunity which pirates had hitherto enjoyed. It was the energy and enterprise of Venice that first broke up the dark despondency of that retrograde time, and inaugurated the revival of civilisation in the Mediterranean: Genoa and Barcelona, with others, followed in the same noble and profitable course; the Catalans especially were conspicuous in what Hallam calls the "two branches of naval energy"—war and commerce. Sovereigns soon saw that by aiding commerce, they increased the wealth of their country, and consequently their own revenue; merchants who had once tasted the sweets of a lucrative exchange, tried by every means in their power, to lessen the dangers incident to sea voyages; an object which they attained by associating their ships in fleets, and, either sending armed vessels as a convoy, or arming each of the merchant vessels. It is probable that the Church, exercising in this, as in other matters, a civilising influence, was forward in aiding the suppression of piracy.

Though we find no positive maritime laws of an ancient date, it is obvious that customs must have grown up among the sea-faring populations from a very early time, this was notably the case in the Mediterranean; and probably this customary law was almost as binding as if it had been

positive law enforced by sanctions. Utility (which Bentham holds to be the test of all law) must have recommended to those who lived upon the waters, the adoption of fixed rules in a life where dangers are incessant, and quarrels almost inevitable. The customary law which then grew up, and which had probably been hitherto only traditional, was first embodied in the *Consolato del Mare*, drawn up at Barcelona about the middle of the 13th century. In this, and the subsequent compilations which were based on it, we should, perhaps, expect to find the subject of piracy largely treated of and condemned, but it is not so; the reason for this probably is, that piracy, still prevalent and powerful, was, as of old, looked upon as a necessary evil. This feeling is traced in the few individual laws, or customs, which we find of an earlier date than the *Consolato*—some of the elements out of which that code was formed. They are as follows:—

Statute of the Two Sicilies (Cir. 1063.) “If merchandise be stolen from a ship by pirates, it ought to be paid for by contribution, and any that may be left ought to contribute to re-place the stolen; the pay of the sailors is not to contribute.*

Law of Aragon (1288.) “Any pirate who arms against enemies must give security not to hurt friends, and to bring captures to the place from which he started, no royal official is to have any part in such armament; if anyone has offended against friends he must be taken, tried, and the goods restored. If any pirate touch anywhere with booty, enquiry must be strictly made, whether it was really taken from enemies.”†

From the latter law we see that under the title “pirates” were then included ships which, in later times, would have been privateers, armed with letters of marque, or reprisals, and thereby distinguished legally from pirates, though their practice often did not differ perceptibly from piracy.

* Pardessus, V. 287.

† *Ib.*, V. 849.

It is nearly two centuries later that we find a prohibition of piracy by municipal law.

Maritime Law of Genoa (1566.) "Nemo civium Genensium audeat qualecunque genus navigii ad exercendum piraticum instruere vel armare, nec ab aliis armatum vel instructum conscendere; qui contrafecerit laqueo suspendatur. Qui in litore maris rapinam commiserit duplum præstet damnum passo, et tantumdem fisco."

The law further says that piratical ships are not to be received into ports, or individual pirates into houses.

The Baltic was no less troubled with piracy than the Mediterranean. And it is possible that the Sound Dues were levied in the first instance by Denmark, as a return for the expense she incurred in keeping down these marauders.* The ravages of the Northmen are notorious, but the admiration inspired by their courage and enterprise too often blinds us to the real nature of their undertakings, which were piratical in the strictest sense of the term.

For several centuries the depredations in the Baltic continued, and there was no general attempt to repress them, till about 1250, when the merchants of North Germany were forced to unite in the Hanseatic League, as a means of insuring the safety of their commerce. The League, which originated with the towns about the mouth of the Rhine, and spread to the towns on the Baltic, also extended inland, and served the political purpose of protecting the merchants against the robberies and exactions of the lower nobility. The earliest legislation of the Hanseatic League which we possess is of the year 1369. We find a law of the year 1380 relating to piracy, in these terms: "When men, at their own expense, retake merchandise from pirates, they may retain half, and give the other half to the owners. The nearest port ought to send ships of war to places where pirates are said to be, to destroy them, and the towns belonging to the League shall repay the expenses."

We may gather from this that energetic measures were by

* Twiss' *Law of Nations in times of Peace*, s. 179.

this time taken to suppress the Northern freebooters; and such a powerful organization as the Hanseatic League cannot have exerted its force entirely in vain. In the year 1418 the Baltic was desolated by a band of pirates, calling themselves "the Vitellian Brothers," who had originally been embodied to support a war against Norway; thereupon the League enacted that anyone who, in any way, aided the Vitellian Brothers, should be strictly punished.

We have remains of a few laws relating to piracy in States round the Baltic. Such are—

Law of Sleswic (1150.)* "Whosoever commits a theft in a ship, shall be exposed on an uninhabited island, with three days' food, a knife and a fire."

Norwegian Law (1274.)† "Anything bought from pirates must be restored to the owner, on proof by two witnesses: if the purchaser knew they (*i. e.* the sellers) were pirates, he will forfeit a mark to the King."

Law of Hamburg (Cir 1497.)‡ "If agreement is made with pirates to give up part of the cargo, in order to save the rest of the cargo and the ship, then the loss is shared by all; but if the pirates take part of the cargo the loss is not to be shared."

The object of this law evidently was to prevent people coming to terms with pirates, instead of resisting them to the utmost. A similar enactment also existed in England.

Law of Denmark (1508.)§ "If a ship or merchandise be taken by pirates, each shall bear his proportionate loss: if one gets back something belonging to him, he need not share it with the rest; but if part of the cargo is *taken* from the ship, then the loss must be shared by all."

This was probably intended to make those who had no interest in the cargo fight as stoutly as those who had many goods on board.

If piracy was not more accurately defined in the parts of

* Pardessus, III. 280.

† *ib.* III. 22.

‡ *ib.* III. 370.

§ *ib.* III. 238.

those old laws that have been lost, than it is in the parts that have come down to us, there must have been considerable danger of an accusation of piracy being used as a weapon against any obnoxious or suspected person.

The disorders and pillage on land that characterised the early Middle Ages almost ceased in the 12th century: but it was not till much later that disorders by sea were at all suppressed. The "wet ways" have always been the last resort of lawlessness and violence.* Conventions between governments were few, and there was no one state so pre-eminently powerful that it could constitute itself guardian of the seas.

Permanent fleets—standing fleets (to borrow an expression from the sister service)—were not generally maintained as police of the sea. Even in great naval wars, much was still left to private enterprise; thus Henry III of England, when his fleet was destroyed by the French, ordered the men of the Cinque ports to attack French commerce. In such a state of affairs, piracy naturally flourished. Mathew Paris tells us how pirates, under orders of Simon De Montfort, burnt Portsmouth. Dunkirk was long a nest of pirates who preyed on Dutch commerce, attacking only non-combatants: and about the 16th century they interfered greatly with the herring fishery.† The letters of Reprisals which Sovereigns were in the habit of granting also tended in no slight degree to encourage and shield piratical acts. From 4 Henry V. c. 7, which shews us how early such letters were given, we also gather that it was not unusual to stipulate by treaty that Marques and Reprisals should cease as between the contracting parties; the Act says:—"of all attempts made by his enemies upon any of his faithful liege people, against the tenour of any truce, wherein is no express mention that all marques, reprisals, shall cease, the same our sovereign lord the King will grant Marques in due form to all them that feel themselves in this case aggrieved."

Grote. *Hist. of Greece*, II. 111.

† Motley, IV. 205.

It is easy to imagine the attraction that a piratical life must have had for its adventurous spirits of all ages: hence its universality, and the difficulty of suppressing it. In the words of a wild spirit who himself loved the blue waves devotedly.—

"Oh, who can tell, save he whose heart hath tried,
And danced in triumph o'er the waters wide,
The exulting sense—the pulse's maddening play,
That thrills the wanderer of that trackless way?
That for itself can woo the approaching fight,
And turn what some call danger to delight.

* * * * *

No dread of death if with us die our foes—
Save that it seems e'en duller than repose.

* * * * *

Ours are the tears, though few, sincerely shed
When ocean shrouds, and sepulchres our dead." *

While the robber on land must lurk in concealment after the commission of the offence, the sea-rover scuds over the blue waves, and, thanks to the swiftness of his ship and the dexterity of his seamanship, he generally bids defiance to the pursuit of justice.

The great sea-captains of the Elizabethan age, of whom Englishmen are often so proud, were in reality little better than pirates; to an insatiable thirst for conquest and love of acquisition, they added a great indistinctness in their conception of the difference between *meum* and *tuum*. "It would be hard," writes Motley, "to maintain that Martin Frobisher, Mansfield, and the rest of the sea kings, with all their dash and daring, were not as unscrupulous pirates as ever sailed blue water, or that they were not apt to commit their depredations upon friends and foes alike. Drake and Cavendish were mere pirates, their only point being that they attacked all nations impartially." † In 1599 Elizabeth made proclamation that all masters of ships with letters of marque were

* Byron—The Corsair, I. i.

† Dyer. Modern Europe III. 417. This only good point is, in our view of the law, a great argument for holding them to be pirates.

to give security that they would commit no injury upon subjects of friendly powers ; but this was not effectually carried out owing to the strong piratical interest which there then was in England, were the returned sea-rovers had bought themselves good positions. That the English were generally credited with these acts of aggression, and that they themselves were not ashamed of them, we may gather from the following words of Lord Stowell : * “ There was a time when the spirit of bucaneeering approached in some degree to the spirit of chivalry in point of adventure ; and the practice of it was thought to reflect no discredit on the distinguished Englishmen who engaged in it. The grave judge (Scaliger) observes, in a strain of rather doubtful compliment, *nulli melius piraticam exercent quam Angli.*”

The Bucaneers of the West Indies exhibited another phase of piracy. In the beginning they were chiefly French, but afterwards the English element predominated. At first they remained in the neighbourhood of the Antilles, and attacked only the Spanish treasure ships, but afterwards they made their piratical character more apparent by attacking the property of all nations without respect. France, whose one object was to destroy Spanish commerce, gave commissions to these sea-rovers, but did not thereby exempt them from liability to charges of piracy ; for she exercised no surveillance over them, and most assuredly she would not have considered herself answerable for their actions. They exhibited such great bravery and enterprise, that it has been observed “ if they had leaders capable of framing laws, they might have become a State. Rome and Normandy had no more honourable beginnings.” † But the cruelties they practised were terrible ; towns were burnt, the inhabitants enslaved, or only released on payment of an enormous ransom. “ We don’t know,” says M. Martens, ‡ “ whether we

* 2 Dods, 374.

† Cressy III. 468.

‡ Essay on Privateers, 13.

ought to be most scandalised at the complaisance of France, or the atrocities committed by this horde, but such was the eagerness for commerce that for its sake the most civilised nation in Europe, about the same time, bought the help of these wretches in America, and humiliated itself so far as to purchase, by a disgraceful tribute, freedom from the African corsairs." Filibustering ceased as soon as England and France maintained a strong administration in the Antilles.

A great deal of ingenuity and labour has been expended on the discussion of the question whether the Barbary States were, or were not, pirates. There is much diversity of opinion on the point, but no one seems to question the truth of two things, that on the one hand the acts of these men were piratical, that on the other hand they formed organised communities. Some deny the possibility of a piratical nation: "a nation can never be deemed pirates; fixed domain, public revenue, and a certain form of government, exempt them from the character."* Such is, also, the opinion of Bynkershoek, who observes that the fact of treaties having been made with the Barbary States, and ambassadors sent to them, proves them not to be pirates in general estimation.†

Chief Justice Story, however, holds that "though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws which they have violated, yet they are not considered as a national body, or entitled to the laws of war, as one of the community of nations." In this view a society of pirates (as the Barbary States unquestionably were at first) can never develop into a nation, unless it utterly renounces its piratical habits (and the Barbary States never did renounce these habits till 1830). In the case of an English ship taken by Algerines and then re-taken, Sir L. Jenkins decided that they were

* Browne's Civil Law of Admiralty, ii. 461. This definition of a State is borrowed from Cicero, Phil. iv. *Res publica, curia, asarium, consensus et concordia civium, ratio aliquis parvis et faderis.*

† *Quæstiones Juris Publici*, xvii.

enemies and not pirates, for the Algerine government had been recognised by treaties, and even consuls and residents had been established there.* Again in 1801, the English Admiralty decided that they were established governments; a decision which seems to render doubtful the justice of Lord Exmouth's attack in 1816.

In spite of this authority on the other side, it seems difficult to get over the fact of their piratical mode of life: they were none the less pirates because they were successful and powerful; we must not cherish the sentiment enunciated by the pirate, who, on being reproached by Alexander with his condition, answered that he was "a pirate because he only had one ship, if he had a fleet he would be a conqueror," a feeling which Bishop Porteous has expressed in other words,

"One murder makes a villain,
Millions a hero."

The treaties made with the Barbary States were the necessary consequence of their successful piratical raids; and had for their object the redemption of prisoners, and the procuring of immunity for the future. It may be asked, why, if they were pirates, were they not suppressed? "The Christian powers were too long suffering; by making treaties with Deys and Beys, and presenting annual gifts, they in fact legitimated piracy."† The only constant opposition was offered by the gallant Knights of St. John, who held Malta from 1522 to 1800. The mutual jealousies of the Christian powers (especially as to naval matters) were the cause of their apparent apathy: they would not harmoniously unite in a great expedition, nor would they allow any one State to undertake the business, for fear of its thereby gaining too great an accession of power; so they adopted the pusillanimous method of buying impunity, each State for itself as best it could.‡ That the disgrace of paying such a

* Wildman I. 202. † Cussy, ii. 418.

‡ There is extant an amusing treaty of the year 1815 between Tripoli and Tunis and the United States of America, stipulating that U.S. ships on entering Gouletto shall have a salute of 21 guns "without having to provide the powder themselves!!"

tribute was deeply felt we may gather from contemporary writers. The Abbé Raynal exclaimed in 1770—"what nation is destined to break the fetters which Africa is slowly forging upon us . . . it ought to be the work of an unive:sal league . . . the rich productions of the soil ought to be exchanged for the work of our industry and manufactures."*

After 1800, when the Knights of St. John were no longer there to check them, these pirates became more daring, and by refusing to let French ships pass unmolested without paying an annual tribute, they brought down upon themselves the wrath of him who was of all men the best qualified to put an end to the nuisance, and was not troubled by petty technical scruples as to whether the offenders came within the exact legal definition of piracy. They had threatened him—they must make reparation or perish! Napoleon, then first Consul, demanded instant restoration of the French ships which had been seized with their crews; otherwise "*Je detruirai votre ville et votre porte, je m'emparerai de votre coté, si vous ne respectez la France dont je suis le chef, et L'Italie où je commande.*" This characteristic threat he was proceeding to carry out with characteristic rapidity when the Algerines judiciously yielded. In 1829, Charles X made Algiers a French colony; two years later slavery was abolished, and piracy interdicted by treaties with Tunis and Tripoli.

Piracy is a crime of great enormity: committed as it generally is in the solitude of the seas, there is great difficulty in apprehending the offenders; and even when they are apprehended, almost greater difficulty in obtaining their conviction.†

Chancellor Kent ranks it with violation of safe-conduct, and infringement of the rights of ambassadors, as the three most injurious offences against the law of nations.‡ It is

* *Cvssy*, i. 420.

† For the difficulty of conviction, and how it may sometimes be overcome by cumulative evidence, see the trial of T. Green for Piracy, Robbery, and Murder, in the High Court of Admiralty in Scotland in 1705. *State Trials*, xiv. 1199.

‡ *Kent, Com. on American Law*, i. 183.

a crime generally accompanied by great and (so to speak) unnecessary cruelties and destruction of property; for the pirate not only takes what he wants, or what he is able to take, of the merchantman's cargo, but throws the rest overboard, and kills the crew to prevent their appearing as witnesses against him. Robbery on land concerns only the interests of individuals, or at most the interests of one State; but robbery on the sea, the common heritage of all, affects the interests of kingdoms and nations. Hence the universal enmity towards pirates (those *hostes humani generis* as Lord Coke, quoting from Cicero, calls them), and the severity of their punishment: "with professed pirates there is no state of peace; they are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war."*

There are no supreme Courts with jurisdiction over all the nations by which piracy, and other offences against the law of nations, can be tried; and therefore they are tried by the particular courts of each nation and punished as offences against the law of each nation. This is a point which enhances the difficulty of the detection of such offences, and of the conviction of the offenders.

It is the absence of special motive that makes piracy dangerous to all: "the danger created by acts depends on their motive; thus robbery is more dangerous than revenge."† Pirates have no *animus* against any particular nation as such; only an *animus furandi* against any ships they may happen to meet with, whatsoever nation those ships may belong to.

Definitions of piracy vary, not in principle, but in mode of expression. "There is scarcely a writer on the Law of Nations," says Story, "who does not allude to piracy as a crime of a settled and determinate nature." Every writer endeavours according to his lights, to define with greater precision the offence whose nature every one of them

* Lord Stowell, the "*Le Louis*," 2 Dods, 244.

† Bernard, *British Neutrality*, 118.

has clearly shaped in his "mind's eye." So uniform is the conception that an Act of Congress* of the United States attaches penalties to all "who shall commit the crime of *piracy as defined* by the law of nations," without adding any further description of the crime. Such confusion and discrepancy as is to be found in the various attempts at definition, is to be attributed to two causes: (1) failure to distinguish clearly between piracy under the law of nations and piracy by municipal law,† (2) and that excessive love of precedent, and reverence for the authority of previous writers, which leads each new Jurist to improve old definitions by adding phrases to them, rather than by subjecting them to the indignity (as he considers it) of alteration or partial suppression.

A definition of piracy proper is only concerned with piracy under the law of nations. An analysis of the idea of piracy generally received under the law of nations will be the best means of arriving at a clear and concise definition. All true piratical acts have two main characteristics:—

I.—Depredation or attempted depredation on the high seas.

II.—Absence of lawful commission on the part of the depredators.

1. *Depredation*.—There must be an act, or actual attempt; mere presumed piratical intention is not sufficient.* But the slightest attempt coupled with absence of lawful commission is sufficient to constitute piracy; thus it is piracy to attack a ship and take nothing but an oath from the master for redemption.‖

* Act of 1820.

† 5 Wheaton's Reports, 163.

‡ "We must not think that the French Tribunals in time of peace would have the right of trying and punishing a foreign ship which, without committing any act of hostility or violence, should sail, even armed, without regular papers, or with commission from several ports, the pirate, "n'est que celui qui fait des hostilités pour son propre compte":—*depredendi causâ*—Speech of M. Collard, Professor of International Law at Paris, on the occasion of the passing of the law of 1825. *Apud* Cassy I. 289.

‖ Molloy. 59. So Phillimore I. XX. 379 "Piracy is an assault upon vessels navigated on the high seas, committed with *animus furandi*, whether the robbery or forcible depredation be effected or not; and whether or not it be accompanied by murder and personal violence." In State trials XIV p. 1067 we find how Captain Quilch and others were charged at Boston, United States, in 1704, for that they did "by force and arms upon the high seas—practically and feloniously seize and take out of the vessel a quantity of fish and salt to the value of £3;" this, however, was only one of the counts in the charge against them.

"High seas" must be interpreted, not in its more general sense of all the sea beyond an imaginary line drawn from point to point of the coast, but so as to include bays, harbours, and rivers up to the first bridge, which are the limits of the jurisdiction of the admiralty. Between high and low water-mark the jurisdictions of the admiralty and common law alternate with the ebb and flow of the tide. It has been held that a person shooting from the shore and killing a man on board ship was guilty of piracy, "for the offence was committed where the death happened, and not at the place whence the cause of the death proceeded.* Some writers † add to their definition the words, "or by descent from the sea on the coast." And such attacks have, in some few isolated cases, been held to be piracy. But the legality of these decisions seems doubtful, and, granting their legality, it is not a matter of sufficient importance to be included in a definition like the present.

2.—*Absence of Lawful Commission.*—This is the chief element of piracy.‡ When a ship has a lawful commission either of Marque or Reprisals, the Government which gave that commission can be held responsible for the acts of this ship. Knowing this, the Government will enquire into the character of the ship before it grants a commission, and will exercise supervision over the ship after the commission has been granted; and the ship, on its part, fearing to lose its commission, will abstain from illegal acts. The feeling was entertained in early times that belligerent acts were illegal except in those who had some public commission or authorisation. Cicero|| quotes from a letter of Cato in which "*negat jus esse qui miles non sit, pugnare cum hoste.*"

* Russell on crimes I. 156.

† Woolsey; "Piracy is robbery on the sea, or by descent from the sea on the coast, committed by persons not holding commissions from, or at the time pertaining to, any established state" S. 187.

‡ Pirata quis sit neque, inde pendet an mandatum prælandi habuerit. . . . Qui nullius principis auctoritate rapiunt, piratarum vocabulo intelliguntur. Bynkershoek. Quæstiones Juris Publici (1737) xvii.

|| De Off. i., xi. 37.

"Lawful commission"* excludes most if not all cases of commissions granted to one vessel by several states, whether those states be belligerent or allied, and all cases of commissions held by other than the subjects of the state granting the commission.

Many writers give as a necessary element in piracy "the making war upon all nations alike." But this does not seem necessary to constitute the crime; for a ship without lawful commission would be guilty of piracy though it restricted its depredations to the property of one nation.† If, however, these writers mean "the intention to depredate on any ships they may meet with, without any regard to nationality," they are no doubt right; that intention is incident to piracy,‡ and perhaps should find some expression in the definitions, though a definition would not be incomplete without it, for the very word "depredation" taken with the rest of the definition, conveys to most minds some such idea.

Piracy, then, under the law of nations may be defined as depredation, or attempted depredation, committed on the high seas, without regard to nationality, by any person who has no lawful commission.

Having thus defined piracy under the law of nations, we must treat of piracy by municipal law.

Further definition of such is unnecessary, and, in a brief form, would be impossible, because every such act of piracy, is, (or ought to be) defined by the law which creates it.

Piracy under municipal law may be subdivided into:—

I.—Piracy created by special convention between two or more States.

* Twiss, *Law of Nations* 1. 899.

† Thus the Buccaneers did not eschew piracy by confining their attention, as they did for some time, to the ships of Spain; the ships of Spain were probably at that time the only ships worth attacking.

‡ Even this must be modified in the case of the Barbary pirates who spare (or undertook to spare) the ships of such nations as paid tribute

II.—Piracy created by the municipal law of one State.

It may, at first sight, appear that the former of these divisions ought more properly to be considered as a third species of piracy, intermediate between piracy under the law of nations, and piracy by municipal law ; but it may with good reason be considered part of the latter, because in most instances of such conventions, the municipal laws of the respective contracting parties enact specially that such of their subjects as violate the convention shall be liable to the penalties of piracy as inflicted by those municipal laws. And indeed, it is *only* by municipal law that cases of such piracy can be investigated, and the guilty parties punished.

The characteristics of piracy by municipal law are these :— it can be tried *only* by the State whose law has created it, *only* within the jurisdiction of that State : *only* in the persons of subjects of that State. In cases of piracy created by special convention between two or more States, a similar rule applies : *only* the courts of the contracting parties can try and punish it : *only* the subjects of the contracting parties are liable, and that only within the jurisdiction of the contracting parties. “ It is piracy by international law as between the contracting parties.” *

The term “ piracy ” is often applied to acts which are thus piratical only by municipal law, or by special convention ; such as acts committed by a lawful man of war or privateer in excess of its commission, which acts have been made piratical by the municipal law of some nations when committed by the subjects of that nation, but which are not piratical under the law of nations.†

In construing the word “ piracy,” therefore, it must first be discovered, whether piracy under the law of nations, or piracy by municipal law, is meant. If the latter, the nationality of the writer must be clearly kept in view, because what

* Wildman's Institutes of International Law I. 179. II. 150.

† 11 & 12, William IV., c. 7.

is piracy by the law of one nation may not be piracy by the law of others. *

Bynkershoek mentions certain offences,[†] which, on account of their atrocity, had been made piracies by the Belgian law. It would appear that naval powers have, at various times, endeavoured in this way to check such offences as happened to be peculiarly rampant at sea, just as in England offences, especially obnoxious on land, have for the same purpose been from time to time created treasons.

The best illustration of the manner in which piracy is created by special convention and by municipal law, is to be found in the history of the suppression of the slave trade. In the last century such a commerce was not only approved of, but thought worthy of encouragement, and the privilege of sharing in it was emulously sought for. As late as 1817 Lord Stowell declared, in judgment, "Trading in slaves is neither piracy[‡] nor legally^{||} criminal; sanctioned by ancient admitted practice, by general tenor of laws and ordinances, by formal transactions of civilised States, and by the doctrines of the courts of law of nations."

But Denmark had already, in 1792, given the first expression to the feeling that was rising up against the traffic, by prohibiting her subjects from engaging in it. In 1824 England declared it piracy, and since that time a vast number of special conventions[§] have been entered into by various States, mutually conceding the right of visit and the right of search,

* Thus the American law defines piracy as "robbery in or upon any ship, ship's lading, or company." Under this would come robbery by an individual on board a ship owning the jurisdiction of the U.S., whereas English law treats robbery and murder by an individual on board a ship owning the jurisdiction of the State, just as it would treat them if committed on any other part of the State's territory.

Cutting and destroying fishing nets, when set out at sea, was one of them.

† i.e. piracy by the law of nations.

|| i.e. piracy by municipal law.

§ Between 1814 and 1850 England entered into 48 treaties with various States to this effect, 24 of which were in force in 1850, besides 42 treaties with native chiefs on the West Coast of Africa.

rights which have always been among the vexed questions of international law, and have notoriously interfered with the due suppression of the slave trade. Also, a great many States have individually declared that any of their subjects engaging in the traffic will be treated as pirates.* But with all their prohibitions, the slave trade has not become piracy by the law of nations; for it to become so technically, there would be required, either an unanimous jointly expressed consent of all civilised nations (for only civilised nations are taken account of in international law); or else a special convention, to the same effect, between every nation and every other nation; both these alternatives seem almost, if not quite, impossible. But this much we may confidently say: if ever, by means of accumulated special conventions and municipal laws, an Act, once piracy only by municipal law, can be created piracy under the law of nations (a point which must be left for higher authorities to decide), the act which most deserves, and is most likely, to be so created, is the Slave Trade.

There is this limitation to the operations of municipal law in dealing with piracy: it must not violate established principles of international law.†

Act of Congress of the United States of 1820.

† "No nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own."—Lord Stowell. Judgment in the case of the "*Le Louis*," 2 Dods, 251.

To be continued.

VI.—THE HISTORY OF THE WORD "LAW."

PART I.

Di immortales! quam tu longè juris principia repetis!—CICERO: De Legibus.

IN this article we propose to examine certain ambiguities and inconsistencies in the use of the word *law* by writers on jurisprudence, and to endeavour to show historically how those ambiguities arose.

Words expressing fundamental ideas are difficult to define even if they have only one meaning, but the word *law* is of all scientific terms the most ambiguous. It is common to philosophy, to theology, to all the sciences, to popular language, (games, &c.), and to jurisprudence; it is used in every one of these departments in many and different meanings, and is imported from one department into the others without warning and without apology, whenever the speaker wishes to protect a false conclusion by a false analogy. But it is in jurisprudence that *law* is most misleading, for it is there used to express three different conceptions, not sufficiently dissimilar to be safe from confusion. These three conceptions may be provisionally distinguished as "law," "legal rule," and "statute." By "statute" is here meant a *legislative enactment*, by "legal rule" a principle or *norma agendi* capable of judicial enforcement, and by "law" *aggregate of legal rules*. Examples will show that the word is really used in these three senses. In the phrase, "Jurisprudence is the science of law," we mean by *law* the abstract *aggregate of legal rules*, or the whole subject of all legal rules, either of a given country or epoch or without reference to time or space. In speaking of the "Laws of England" we mean all the *legal rules* now or formerly in force in England. When the Corn Laws are mentioned, we understand certain *statutes* to be meant.

Curiously enough, the sense of *law* which is less frequently used in practice than the other two, is the one which has always been selected for definition by jurists. *Law* is seldom used by lawyers in the technical sense of *statute*, for in such instances as the "Game Laws," the "Corn Laws," &c., the word seems to have been adopted from popular language. We speak of the Bankruptcy Act, not of the Bankruptcy Law, the Real Property Statutes, not the Real Property Laws, because these are technical subjects of no political interest. When we speak of Real Property Law we mean, not a statute relating to Real Property, but the body of legal rules (forming part of the law of England) which relate to Real Property, some of them being derived from statutes, but the greater part from the Common Law. The confusion between these three senses of *law* has, no doubt, partly arisen from the fact that there are cases in which they may be applied as convertible terms. For instance, Evidence is a branch of the law of England, *i.e.*, it consists of a number of legal rules which form a system because they relate to the same subject, not because they arose at one time. If an Act were passed, forming the exclusive source of rules on questions of evidence, the Act would not only be a law relating to evidence, namely, an Evidence Act, but it would also form *the* Law of Evidence, *i. e.*, a system of rules forming part of the whole law of England, and each of its rules might be called a Law of Evidence.

Before discussing the origin of this ambiguity, it will be convenient to examine the definitions of the principal English writers on jurisprudence, observing, at the same time, whether they have satisfied their own authors, and the writers who have substantially adopted them.

1. Bracton. There are so many inconsistencies in Bracton's definitions, owing to the variety of sources from which he took his materials, that it is difficult to say whether he really grasped the distinction in question. The full title of his work is "De Legibus et Consuetudinibus Angliæ," and in the first chapter he explains why he uses the word

cousuetudines: "Cum autem ferè in omnibus regionibus utantur legibus et jure scripto, sola Anglia usa est in suis finibus jure non scripto et consuetudine. In ea quidem ex non scripto jus venit quod usus comprobavit." From this it would appear that he saw the difference between "law" (*jus*) composed of customs and that composed of "statutes" (*leges*), but in his definitions of *lex* and *jus*, (cap. III) there is some confusion: "Lex est commune præceptum virorum prudentum consultum, delictorumque quæ spontè vel ignorantia contrahuntur coertio, rei publicæ sponsio communis.* Item author justitiæ est deus, secundum quod justitia est in creatore. Et secundum hoc jus et lex idem significat. Et licet largissimè dicatur lex omne quod legitur, tamen specialiter significat sanctionem justam jubentem honesta, prohibentem contraria." In cap. IV he says: "Jus autem derivatur a justitia, et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de jure, quia jus dicitur ars boni et æqui, cujus merito quis nos sacerdotes appellat: Justitiam namque colimus et sacra jura ministramus."

Let us compare these passages with an extract from Azo's *Summa Institutionum*† (De justitia et Jure):—

"Jus ergo derivatur a justitia et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de jure, et dicitur ars boni et æqui, cujus merito quis nos sacerdotes appellat, justitiam namque colimus, ‡ sacra jura ministramus. Unde et leges dicuntur sacratissimæ. Boni et æqui noticiam profitentur, æquum ab iniquo seperantes [sic], licitum ab illicito discernentes; bonos non solum metu pænarum verum etiam præmiorum exortatione efficere, veram nisi fallor philosophiam non simulatam affectantes ut ff. eo l. j. Est autem ars secundum Porphirium de infinitis finita doctrina ab artando dicta, et bene potest hæc juris notitia ars appellari, quia finem habet mirabilem, licet aliæ omnes artes fere infinitæ sint ut in prohemio digestorum *sed quia*. § Vel dicitur ars, id est artificium. Nam auctor juris est homo, auctor justitiæ est deus, et secundum hoc jus et lex idem significant. Licet

* Almost verbatim from Dig. I., 3, fr. 1.

† Ed. 1484. The original is printed in contractions.

‡ Dig. I. 1. 1. s. 1.

§ i.e. Const. *Tanta* s. 18.

autem largissime dicatur lex omne quod legitur, * tamen specialiter significat sanctionem justam, jubentem honesta, prohibentem contraria."

Philosophy is certainly a snare to jurists.

2. Hobbes does not profess to discuss law as a professed lawyer, but "as Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law."† His definitions on the subject are closely connected with his theory of sovereignty, according to which the members of a commonwealth institute Government by agreeing with one another to submit to some man or assembly of men. Among the powers given to the sovereign by this institution is the "whole power of prescribing the rules whereby every man may know what goods he may enjoy and what actions he may do . . . these rules . . . are the civil laws."‡ "And, first, it is manifest that law in general is not counsel, but command, nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him."§ "Law implieth a command;"|| "when the command is a sufficient reason to move us to action, then is that command called a law."¶ "A covenant obligeth by promise of an action or omission especially named and limited, but a law bindeth by a promise of obedience in general, whereby the action to be done or left undone is referred to the determination of him to whom the covenant is made. So that the difference between a covenant and a law standeth thus: in simple covenant the action to be done or not done is first limited and made known, and then followeth the promise to do or not do; but in a law the obligation to do or not to do precedeth, and the declaration what is to be done or not done followeth after."**

* Cf. Grotius *De Jure Belli*. I. i. s. 9.

† *Leviathan*, ch. 26. (Molesworth's edition, III., 251).

‡ *Ubi supra* 159.

§ *Leviathan*, ch. 26.

|| *De Corpore Politico*, part II., c. 8, s. 6.

¶ *Human Nature*, c. 18, s. 6.

** *De Corpore Politico*, part II., c. 10, s. 2.

This celebrated analysis of law into a command by a political superior to a subject has been adopted by Austin with very slight modifications. An inquiry into the correctness of the analysis may therefore be postponed until we come to Austin, but a few words should here be said on Hobbes's other theories.

The notion of a social contract is now universally abandoned,* but it has not been thought necessary to reject Hobbes's conception of the law at the same time. Yet the latter depends so entirely upon the former, that without the express appointment of a sovereign the notion of law as equivalent to a command ceases to be intelligible. Until a definite sovereignty is instituted (and there must be a preliminary stage) law can only exist by consent, and Hobbes, in his comparison between covenant and law, expressly excludes consent as an element of law.

One great merit of Hobbes is the clearness with which he distinguishes between technical law and law in the philosophical sense:—"These dictates of reason [laws of nature] men used to call by the name of laws, but improperly, for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves, whereas law properly is the word of him that by right hath command over others. But yet if we consider the same theorems as delivered in the word of God that by right commandeth all things, then are they properly called laws."†

3. Blackstone says:—"Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational."‡ Again municipal law, which is Blackstone's equivalent for the *jus civile* of the Romans, is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."§ Blackstone devotes fifteen pages to the vindication of this definition, but as it is almost

* Block: Dict. de la Politique v. "Contrat Social." Ahrens: Naturrecht I. s. 20. Lorimer Institutes of Law, 8.

† Leviathan, ch. 14.

‡ Comm., i., 88.

§ *ibid.*, 44.

identical with that of Austin, it is not necessary to examine it here. Blackstone's definitions are substantially adopted by Mr. Serjeant Stephen and Messrs. Broom and Hadley in their modern editions of the Commentaries.

4. Austin, in the Analysis of his "Lectures on Jurisprudence" lays it down that "Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called."* And, in the 1st Lecture on the Province of Jurisprudence, he says:—"A law in the most general and comprehensive sense in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being, by an intelligent being having power over him."† "Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*."

Although these are the only express definitions of *law* given by Austin, it is evident that he perceived the inconsistency between them and his definition of positive law and jurisprudence. for he says: "Of the laws or rules set, by men to men, some are established by political superiors . . . the aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the approximate matter of jurisprudence."‡ But although we here have an acknowledgment that *law* sometimes means an aggregate of rules, as well as a single rule, the first definition of *law* quoted above, namely, a command of a particular kind, is the only express one given by Austin, the only one which he analyses, and the only one on which he bases other definitions. It is, as will be observed, taken almost verbatim from Hobbes.

Austin himself felt some difficulty in applying his definition universally, but he escaped from it by two somewhat unfair contrivances: first, by accusing the use of *law* of impropriety, where it cannot possibly be termed a *command*; and, secondly, by the use of the last thing which we should expect to meet in the works of a disciple of Bentham—a fiction.

"Like most of the leading terms in the sciences of juris-

* I. 81 (3rd edition).

† I. 88.

‡ I. 88.

prudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly *laws* are a species of *commands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands, and which therefore are *not* laws, properly so-called. Accordingly the proposition that laws are commands must be taken with limitations. Or rather we must distinguish the various meanings of the term laws and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly. I have already indicated . . . the objects improperly termed laws which are *not* within the province of jurisprudence. . . . There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence."*

These are (1) legislative acts of authentic interpretation, (2) laws to repeal laws, (3) imperfect laws, *i.e.*, of imperfect sanction. They belong to the province of jurisprudence for the simple reason that jurisprudence is the science of "law," not of commands.

Austin proceeds:—"Though these, with the so-called laws set by opinion, and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so-called) which may *seem* not imperative . . . According to an opinion which I must notice incidentally here . . . *customary laws* must be excepted from the proposition 'that laws are a species of command.'"

To prove that customary laws are commands, Austin has recourse to a fiction which is extremely useful, or rather indispensable, in the law of agency, but is out of place, to say the least, in jurisprudence—the fiction of *ratihabition*.

"At its origin, a custom is a rule of conduct which the governed observe spontaneously or not, in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the State. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality, a rule generally observed by the citizens or subjects, but deriving the only

force which it can be said to possess from the general disapprobation falling on those who transgress it. Now, when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom) the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the State—an authority which the State may confer expressly, but which it commonly imparts in the way of acquiescence. For since the State may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration . . . the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature" (pp. 104—5.)

All this merely proves that legal rules must derive their sanction from the sovereign; it does not prove that customary laws are commands. The test of law is simply whether it is capable of political or judicial enforcement. Whether the sovereign power commands a course of conduct in a given case, or whether it allows its subjects to indicate what course of conduct they wish to be pursued, the resulting rule is law, but surely it is an abuse of language to call an executive function a command. The sovereign stands by and enforces rules which the people, by their course of conduct, indicate as those which they wish to govern their relations, but the test of such a customary rule of law is not the command of the sovereign, but the consent of the people, and its capacity of being judicially enforced. The sovereign may be compared to a passer-by who decides a dispute between the finders of a treasure.*

It is curious that Austin, who abuses English lawyers in general and Blackstone in particular, (pp. 498, 1018) for

* The true nature of custom is well put by Prof. Lorimer: "The rational will of the community may be declared either expressly, by legislation, or tacitly, by consuetude." *Inst. of Law*, 416. See also Savigny (*System* I. 84) who shews that the rules of customary law are rational, not arbitrary or accidental, and that therefore customary law has a deeper basis than mere habit.

confounding quasi-contracts with implied or tacit contracts, should have fallen into the similar and almost equally obvious blunder of confounding tacit commands with quasi-commands. If an Act of Parliament gives A a right against B it tacitly commands B to perform his duty. But if a judge decides that a custom, never before adjudicated upon, is valid and condemns the defendant for non-conformity with it, the sovereign can only be said to have commanded compliance with it by a fiction—it is a command *ex post facto*, a quasi-command.* Moreover if every rule of customary law is a command, we must suppose that the kings of England created the conflicting rules of common law, equity, and admiralty-law by command, and with malice aforethought, presumably for the purpose of increasing the revenue.

All these difficulties disappear if we recognise the fact that *law* has two meanings, viz., an aggregate of binding rules of whatever origin, and a legislative enactment. The latter is a command, the former is not. Austin took the latter meaning only, and endeavoured to make all his other theories fit his definition of it.

4. Mr. Markby, in his "Elements of Law,"† avoids the error committed by Austin in so far that he expressly defines Law as "the *body* of commands issued by the rulers of a political society to its members." This is a definition which *might* be correct, for it is possible to conceive a system of law consisting entirely of legislative commands, but it is hardly a correct description of any system which has hitherto existed and is certainly not applicable either to English law or Roman law. On the subject of customary law, too, Mr. Markby differs from Austin in treating it, not as "a

* Austin might have followed his favourite model Bentham with advantage in this instance: "When a tacit expression of the will of a superior is supposed to have been uttered, it may be styled a *fictitious command*. Were we at liberty to coin words after the manner of the Roman lawyers we might say a *quasi command*. The Statute Law is composed of commands, the Common Law of *quasi commands*." *Fragment on Government*, ch. i. s. xii. n. (b). An equally sagacious observation is made in the note to the Introduction to the *Fragment*, cited post, but in his express definitions he calls law a command. *Nomography* c. ii.

† Clarendon Press Series, 1871.

branch of judge-made law," but as "an independent source of law." By this the author probably means that it arises from the tacit commands of the sovereign authority, but without the necessity of judicial assent (ss. 65-71). This does not, however, as the author admits (s. 71) do away with all the difficulties of the subject.

5. Sir Henry Maine, in his work on "Ancient Law," cautions the student against too implicit a belief in Bentham and Austin's analysis of *law* into a command, an obligation and a sanction. "The results of this separation tally exactly with the facts of mature jurisprudence, and by a little straining of language they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection: and it is curious that the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined." *

Again, in "Village Communities," the author observes:—

"Without the most violent forcing of language it is impossible to apply these terms *command, sovereign, obligation, sanction, right*, to the customary law under which the Indian communities have lived for centuries, practically knowing no other civil law obligatory . . . Under the system of Bentham and Austin the customary law of India would have to be called morality, an inversion of language which scarcely requires to be formally protested against. . . . Though it be improper to employ these terms *sovereign, subject, command, obligation, right, sanction*, of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending, and which it is sure ultimately to reach." †

The only objection to these remarks is that they do not go far enough. If the analysis of law suggested by Hobbes' (not by Bentham, who, as we have seen, perceived its inapplicability to customary law) is not true of all law, it must

* *Ancient Law* 8.

† *Village Communities*, 67 seq.

be rejected altogether. As Voltaire might have said: "*Brûlez vos définitions, et faites-en de nouvelles.*"*

The learned author does not suggest a substitute for the "imperative" analysis of law.

6. Professor Sheldon Amos, as might be expected from his unqualified admiration of Austin's work on Jurisprudence,† adopts most of Austin's conclusions, among others the analysis of *law* into command, &c.‡ Professor Amos's definition of jurisprudence is considerably longer than Austin's, but its correctness depends entirely upon an accurate definition of the "fact of law," with which he considers jurisprudence has to deal, and the one given by him is almost identical with that of Austin (p. 73).

7. Mr. Frederick Pollock, in an article on "Law and Command,"§ discusses the difficulties to which the "imperative" analysis of law leads us. He points out that it is too narrow to include customary and international law, that it gives a false idea of right and law, and concludes by suggesting bases for a definition of law:—

"Law in its widest sense is a condition, or assemblage of conditions, under which the evolution of things proceeds: law in the special sense is a condition or assemblage of conditions under which the evolution of a society proceeds, and the determination of which is part of the collective consciousness of that society."

These bases, and the argument on which they are founded, seem to me to be open to some objections.

In the first place, with regard to the distinction between "law" and "statute," Mr. Pollock does not point out that Austin's definition of law is inapplicable to customary and international law, &c., not because it is wrong in itself, but because it is a definition of the wrong word; it is satisfactory when applied to a "statute," but it is no definition at all of "law."

* *Dict. philos. v. "Lois."*

† *Academy I., 154.*

‡ *Systematic View of the Science of Jurisprudence. 1872.*

§ *Law Magazine, N.S. April, 1872.*

Secondly, with regard to the question how far "law" can be extended to include customs, Austin's narrow materialism seems to have indirectly influenced Mr. Pollock's argument. When an author has gone too far in one direction, his successor is liable to be unconsciously led too far in the opposite direction, and I am inclined to think that this has happened to Mr. Pollock in criticising Austin's too narrow conception of the essence of law.

Austin's analysis excludes that stage in legal history where law consists exclusively of customs—Mr. Pollock's definition admits the first stage in the development of a society before the customs are observed consciously. Austin wishes to reduce all jural conceptions to a positive basis, by excluding the period of consensual evolution of law—Mr. Pollock goes so far as to include organic processes. At the time when Austin wrote, the fact that there are no breaks in the processes of nature was not recognized by social theorists; he seems to have been under the impression that a distinct epoch existed in the history of every race when morality was suddenly converted into law, somewhat after the fashion of the imaginary tribe which Blackstone gently laughs at.* We know now that no such epoch ever, as a matter of fact, existed, and that if it had customary law, equity and legal fictions would never have been heard of. But if Austin drew the line too near modern times we must not go too far back and include in the conception of law states of society in which it was as unknown as among a colony of bees. The essential ingredient in jural law is the idea of an extraneous, an objective bond; the bees do not respect their habits and customs because they fear that non-compliance with them would lead to unpleasant results. They follow an internal, a subjective influence which has become a part of their nature not from a conviction of its utility, but because it was necessary for their unconscious development.

It would almost seem as if Mr. Pollock had confounded the two distinct ideas of the laws of nature and jural law.†

* Vol. I. p. 47.

† *Ubi supra* p. 205.

It is no doubt a law of nature that human societies shall follow certain conditions of evolution, and that one of these conditions is a development of habits which subsequently become hardened into jural law, but the latter is not directly connected with the former. They both are links in the same chain, but they are connected as cause and effect, not as parts of the same organic process.* Mr. Pollock defends Hooker's description of law,† (which Austin calls a fustian description) and considers it a creditable one for the age in which Hooker lived. Austin did not comprehend Hooker's views and his condemnation is therefore unjust, but surely Mr. Pollock does not mean that Hooker's description is intended to apply to jural law. Hooker attributes natural causes to God and calls them "laws" which God has imposed, but he points out the distinction between them and positive law in the clearest manner:—

"Societies could not be without government, nor government without a distinct kind of law from that which hath been already declared."‡ "By the natural law whereunto [God] hath made all subject, the lawful power of making laws to command whole politic societies belongeth so properly unto the same entire societies, that for any prince or potentate of what kind so ever upon earth to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny."§

Mr. Pollock has gone far beyond Savigny, although the "collective consciousness" of the society forms part of Savigny's theory of the origin of law.|| But Savigny carefully distinguishes between the law (*Recht*) which is the

* Cf. the article "*Loi*" in Block's *Dictionnaire de la Politique*.

† "All things that are, have some operation not violent or casual. Neither doth any thing ever begin to exercise the same, without some fore-conceived end for which it worketh. And the end which it worketh for is not obtained, unless the work be also fit to obtain it by. For unto every end every operation will not serve. That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure, of working, the same we term a Law." *Eccles. Pol. I. ii.*

‡ *Eccles. Polity I. x. s. 1.*

§ *Ibid. s. 8.*

|| *System I. 14.*

result of a people's development, and the law (Gesetz) of internal necessity, which is the cause not only of the law (Recht), but of the language, character, and morality of the people.* Ulpian's *jus naturale* is much the same as this *lex naturalis* of Savigny, but Ulpian confuses it with the *jus gentium*.

Mr. Pollock's definition does not touch International Law at all.

To be continued.

LEGAL TOPICS.

THE CITY COURTS.—The important question between Local Courts of Record and County Courts cannot much longer be shelved. We have several times drawn attention to the rival City Courts. The Lord Mayor's Court, as our readers well know, is a very ancient tribunal, and its peculiar jurisdiction in the matter of attachments is still very useful to traders and others. There is, however, a very serious bone of contention between the authorities and proprietors of this Local Court and the general law regulating such Courts. The former contend that any, the very smallest part, of the cause of action being within the City of London, gives the Court jurisdiction. The Superior Courts, on the other hand, decide that the Mayor's Court, being an inferior Court, the *whole cause of action* must arise within its local jurisdiction, and hence a large number of applications for writs of prohibition are made every term. The other Corporation Court in the City, called the City of London Court, being established and worked under the County Court system, has a much larger jurisdiction, and, like the general County Court,

* "Vom Beruf," &c., 11 (3rd ed.) Walter (Juristische Encycl., s. 25) says:—"Diese angebliche Rechtsüberzeugung des Volkes ist ein Modeausdruck geworden, der aber nur zu sehr auf Unklarheit und leere Fiction hinausläuft."

any part of this cause of action gives it jurisdiction, but as this Court, unfortunately for its proprietors, is bound to charge the same fees as the County Courts, a very small amount of business over £5 is taken there, and as by another serious defect in County Court practice suitors must do their own law up to the hearing or pay the costs themselves, it reasonably follows, that all traders in the City prefer the older Court, where, although very small costs are allowed under £10, there are some, and tradesmen are not expected to conduct their own cases. Under these circumstances it is not surprising that the citizens and many others catch at the chance of jurisdiction in the Lord Mayor's Court, and very readily swear to the cause of action arising in London, without knowing or considering the legal question—what is the cause of action? This attempt, however, to escape the heavy Court fees in the County Court, and their inconvenient procedure, cannot be used without considerable risk, and in the desire to inform our readers on this practical question we direct attention to the two following cases recently decided in the Common Pleas, on the present practice of the Mayor's Court, London.

Tapp v. Jones.—In reporting this case the *Times* says :—

“The Court of Common Pleas has held that, in order to give jurisdiction to the Mayor's Court the whole cause of action must arise within the City of London. Notwithstanding this decision the Mayor's Court constantly endeavours to assume jurisdiction in cases where the cause of action wholly or in part arises in distant parts of England, and occasionally in the Colonies, and even in India, China, and America. In consequence of these attempts writs of prohibition have been almost daily moved in this Court, and invariably made absolute with costs. The business of the Court of Common Pleas has been greatly and needlessly obstructed by these unavailing efforts of plaintiffs or their professional advisers to conduct litigation in a Court not having jurisdiction. The result invariably is that the proceedings are set aside with costs to be paid by the clients.”

In this case it was sought to show that a judgment of the Court of Queen's Bench gave a cause of action to the Mayor's Court, because its offices are situated in the City of London. Rule absolute with costs.

Robinson v. Emanuel.—This was a similar case to the last, an action on a check given to an hotel keeper in Scarborough, and dishonoured in London. The Court gave judgment, making the rule absolute for a prohibition, with costs. Lord Chief Justice Coleridge said, "this was a jurisdiction attempted to be forced on defendants by plaintiff's attorneys in defiance of the decisions of the Court. It was important for them to consider how they would stand if their clients turned round and sued them for costs incurred through their defiance of the law, which was perfectly well known to them." Mr. Justice Brett said, "The reason why the Court had been so firm in all the later cases was, that constant attempts had been made by practitioner after practitioner in the City after repeated decisions—attempts for which they must have known there was no colour. It was impossible that the plaintiff's attorney could have honestly thought that he had a right to bring this action in the Mayor's Court. On this ground the Court had determined to stamp out this attempt at dictation—this attempt to break the law."

We have always advocated the amalgamation of these two City Courts; although we fear that the Corporation have now lost the opportunity of carrying out this useful plan. We still contend there is ample scope for this ancient Court of the Mayor and Aldermen in the City of London, after obedience is rendered to the Superior Courts, by limiting its practice to matters wholly arising within its limits.

The Judicature Commission, 2nd Report, will, we suppose, receive the attention of Her Majesty's Government ere long, and we then hope to see all necessary amendments in the County Court system, and would suggest that by simply converting the City of London Court, the City County Court, into a Metropolitan Court, all difficulties would be very easily overcome, and the Mayor's Court left subject to the necessary limitations of the law regulating inferior Courts of Record. Doubtless the Corporation of London who make a large annual profit from both their Courts will object, but looking at the past use of these large funds, especially those derived from the fee for the building fund under the Local Act of 1852, regulating the City County Court, we should expect such opposition to have but small effect on the Legislature.

STATUE TO LORD BROUGHAM.—The subject of a memorial in commemoration of the services of the late Lord Brougham has been for some time under the consideration of a Committee of the Social Science Association and the Law Amendment Society. At a meeting, over which the Lord Chief Baron Kelly presided, it was agreed to adopt, as the most fitting memorial, the proposition to erect a statue in Westminster Abbey or some other suitable place, and a Subcommittee was appointed to make the necessary inquiries.

INTERNATIONAL COPYRIGHT.—A deputation from the Law Amendment Society lately waited on the Colonial Secretary, to urge upon him the necessity of providing better securities for the property of British subjects in intellectual labour in foreign countries, than at present exist. The memorial set forth that under the "Imperial Copyright Act, 1842" (5 and 6 Vict., c. 45), any person, whether British subject or alien, on first publishing a book in the United Kingdom, acquires a copyright throughout the British Dominions. That a British subject publishing for the first time in Canada, or in any part of the British Dominions, obtains no copyright in the United Kingdom nor in any other part of the British Dominions except what the *lex loci* may give him within its limits. That the "Imperial Copyright Act, 1842," prohibits the importation of reprints of British Copyright books into the Colonies. That the "Colonial Copyright Act, 1847," provides for the suspension of the prohibition against importation to the Colonies of reprints of books in which there is British Copyright, in cases in which the Colony makes due provision for the rights of the author, such provision being approved by Her Majesty in Council. That the "Colonial Copyright Act, 1847," has utterly failed in its object, so far as relates to the protection of authors, and that such statute ought to be repealed and fresh provision made for the protection of the Copyright of British authors in the Colonies. The Earl of Carnarvon, in reply, said that the Act of 1847, if it has not been inoperative, has failed to give satisfaction to the parties whom it was intended to

satisfy. There were very few questions of this class which were more important to settle than that before him, yet one sees how very intricate the question is, because he apprehended there were at least four interests to consider in the matter; you have the interest of the author, the interest of the publisher, the interest of the general public, and the interest in this particular case, of the colony wherever that may be. It was a question with which his office was not exclusively concerned. Lord Derby, as Foreign Minister, would no doubt feel a considerable interest in it, also; and his assistance would necessarily have to be invoked for one part of the matter. It would be very satisfactory if they could see their way to give relief from what he thought was a hardship, and put that interest on a better footing than it now stands.

THE RULE AT SEA.—Attention has been called, in Parliament, to the present unsatisfactory state of the Marine Department of the Board of Trade. Constituted by the Act of 1854, at one fell stroke and at one sitting, an executive and administrative authority, it would appear that every possible means should have been taken to secure conformity in the mode of navigating vessels, and assimilation in the terms and meaning applied to such by the seamen of different countries. Unhappily it appears that this is not exactly the case. Although the present steering and sailing rules, submitted by this country in 1863, were agreed to by different nations, it is strange to say that, even at the present day, some extraordinary mistakes are continually happening, as to justify the expectation that something should be done to take out of jeopardy life and property in consequence of a misapplication of nautical phrases. A collision took place, a short time ago, in which one vessel ran into the other lying at anchor on her starboard bow. It was sworn by the man at the wheel, that he *starboarded*, but did not *starboard the helm*! A letter from the Admiralty, of Stockholm, of which the following is an extract, defines exactly how the matter stands:—

"There is no doubt that the original signification of those orders, which signification is still retained by the great majority of seafaring people, originated from the time when the steering apparatus consisted merely of the rudder with its tiller. Under these circumstances, the hand holding the tiller had to be shoved to port or starboard. To name the side of the ship towards which the hand had to be moved, was found to be the readiest manner of attaining the proposed aim of altering the ship's course in the opposite direction. The tiller *pointing ahead* was the instrument in view. But, with the exception of boats and other small craft, modern vessels cannot be steered by means of the hand acting direct on the tiller, besides which we often see the tiller *pointing astern*, in which case, in calling out 'Port the helm!' in order to go to starboard, no part of the helm or steering apparatus, either rudder or tiller, are moved towards the port side of the vessel; but, on the contrary, both are moved towards the starboard side, consequently the action called forth by the order is diametrically opposed to the wording of the same, which is evidently nonsensical."

Directions to *port* are received in different ways by different countrymen. Thus, if a man at the wheel happens to be a Frenchman, or a Swede, he goes to *port* to the left, but if he should happen to be an Englishman, *he ports the helm and goes to the right*. These are anomalies which ought not to exist, but which comes of a greater one, that of the combination of judicial and administrative functions in one corporate body.

SALARIES OF STIPENDIARY MAGISTRATES.—The Magistrates of the Metropolis have, through the intervention of the Hon. G. C. Norton, the late Stipendiary, obtained from the Home Secretary a recognition of their claims to augmented remuneration. When it is known that the annual sum granted, by the House of Commons in 1839, in the days of Hume, to be paid from the Consolidated Fund for the maintenance of the Police Courts, is, notwithstanding the doubling of the population of the Metropolis, never even approached, we feel sure that no one will begrudge the Magistrates a fair addition to their salaries. While congratulating the Magistrates, we trust the Clerks have not

been forgotten. These gentlemen are not brought so conspicuously before the public, but they have been for years patiently performing most important and diversified duties. They receive far inferior remuneration than the Clerks to Justices in important towns, and their work and responsibility of late years have been much increased. The appeal of the Magistrates having been so justly and generously admitted, we believe the recent petition of the Clerks will receive as ready and liberal a response.

IRELAND.

The only topic of conversation amongst the multifarious dwellers in the legal world of Dublin is the new Judicature Bill for Ireland. It is framed as might be expected after the model of the English measure of last year, with certain distinctions and variations in detail, rendered necessary by peculiarities found to exist in the Irish Judicial system. The public mind has been for the last two months prepared for a full discussion of the Appellate question, mediate and ultimate, by the issue, in the Spring, of a new and lengthy pamphlet from the facile and accomplished pen of the first of Irish lawyers—Lord Justice Christian. That most acute master of Jurisprudence has again thrown considerable light on the difficult question of appeal; and he has made it more than ever evident to all, that a change on the Constitution of the Chancery Appeal Court is inevitable. His arguments against the retention of the Irish Chancellorship as a semi-political institution, nobody has attempted to answer; yet it is too much to expect that an office of dignity as old as the days of King John shall perish at the fiat even of the Lord Justice Christian. We need hardly remind legal readers of a controversy which raged during 1872 and 1873 on the assumption of certain quasi-judicial powers by that most anomalous and unnecessary officer—the chief clerk attached to the Lord Chancellor's chambers. This controversy, however, discredited not the Office of Chancellor of Ireland, but some incidents and appendages of modern growth; and there

is no valid reason why the office itself should not, in connection with a High Court of Appeal in Ireland, prove in the future of higher value than in the past.

So much for the Chancellor of Ireland, who will probably be President of a strong Court of Appeal, and also "Minister of Justice," having care of all the Irish judicial and legal departments. The next question is as to an ultimate appeal. On this point the Irish Bar, who have every right to be consulted, are entirely agreed. They met last week, and expressed their opinion most clearly. They do not approve of any supreme tribunal except the old one—the House of Lords. They see no reason why a judicial committee of that august body should not be empowered to sit all round the year, hearing appeals from all parts of the Empire and making reports to their Chairman, the Lord High Chancellor. And consequently the desire that is Lord Cairns and Lord Selborne—for with them the decision virtually rests—may be induced to modify the whole scheme of their Judicature measures of this and the last year, so as to restore the House of Lords (with some improved arrangement of details and some enlargement of power) to its ancient place as the supreme Court of Justice.

No objection can be made to the reduction by two of the Common Law Judges of Ireland, who are manifestly *underworked* in comparison with other Judges. The Bill proposes to raise their salaries, doubtless by way of inducing them to acquiesce in a slight increase of labour being thrown on them. A stern moralist, of the now unpopular school of economists, might perhaps question the propriety of this kind of bribery—but in Ireland such methods are common.

There is to be only one Judge of the Estates Court, notwithstanding the complaints of the "English Solicitor" in the columns of the *Times*, that proceedings in the Court referred to have lately become costly and also dilatory. There is something distinctly Hibernian, it must be confessed, in this as in some few other details of the generally well-devised and carefully prepared Judicature Bill for Ireland.

BOOK REVIEWS.

THE DOCTOR AND STUDENT, OR DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND. New edition, by William Muchall, Gent. (Cincinnati: Robert Clarke and Co, 1874). This little work, which is so well known by name at least to English lawyers, was first published in 1518, the original author having been (it is generally supposed) one Christopher Saint Germain, a barrister of the Inner Temple. The fiction (as we may assume it is) upon which the plan of the treatise is conceived is this,—A doctor of divinity, who was ignorant of French and was thereby debarred from studying at first hand the laws of England in which he professed to take a great interest, applied to a student of law, who was tolerably acquainted with the subject, to learn from him “what be the very grounds of the law of England;” and the student having acceded with a becoming humility to the request of the doctor, a dialogue is at once opened between them regarding the grounds of the laws in question, and runs on through numerous discussions partly concerning the theoretical principles and partly concerning the practical effects of certain rules of law.

The fiction in question seems to be a sort of *pia fraus*, or pious fraud, in the author, having for its justification the improvement of the positive law of the country at a time when the popular ventilation of abuses in the law was as yet an unknown instrument of change. A few of the particular subject matters of discussion will illustrate the kind of influence which the “Doctor and Student” was intended to bring to bear upon English jurisprudence.

At page 60 of the American edition which is now before us, the following question is made the subject of the dialogue:—“If any infant that is of the age of 20 years and hath reason and wisdom to govern himself, selleth his land and with the money thereof buyeth other land of greater value than the first was, and taketh the profits thereof; whether may the infant ask his first land again in conscience as he may by the law?” To this question the student replies: “Me seemeth, that forasmuch as the law of England in this article is grounded on a presumption, that is to say, that infants commonly afore they be of the age of 21 years be not able to govern themselves, that yet, forasmuch as that presumption faileth in this infant, that he may not in this case with conscience ask the land again that he hath sold to his

great advantage, as before appeareth/" To this answer the doctor objects the following question: "Is not this sale of the infant voidable in the law?" And the student having admitted as much, but insisting that the purchaser has title "by conscience," the doctor again objects that "sales or contracts although grounded on the *Jus Gentium*, because they are so necessary and so general among all people, are not therefore grounded on the law of reason, for the *Jus Gentium* may alter, which the law of reason can never do. For instance, suppose a statute that forbade the sale of land, then if a man against that statute sold his land for a sum of money, yet the seller might lawfully retain his land according to the statute; and then he were bound to no more but to repay the money that he received with reasonable expenses in that behalf. And so in likewise methinketh that in this case the infant may with good conscience re-enter into his first land; because the contract after the maxims of the law of the realm is void; for as I have heard the maxims of the law be of as great strength in the law as statutes. And some think that in this case the infant is bound to no more but only to repay the money to him that he sold his land unto, with such reasonable cost and charges as he hath sustained by reason of the same. But if a man sell his land by a sufficient and lawful contract, though there lack livery of seisin or such other solemnities of the law, yet the seller is bound in conscience to perform the contract. but in this case the contract is sufficient, and so methinketh great diversity betwixt the cases." Whereupon the student expresses himself contented with the doctor's opinion.

Again, at page 105, there occurs this question,—“What is meant by this term, when it is said, ‘Thus it was at the common law?’” And three meanings are given to the phrase, viz., (1) The common law as opposed to the law of the Courts Ecclesiastical or of the Court of Admiralty; (2) The common law as meaning that law which is administered in the King's Bench, the Common Pleas, and the Exchequer; and (3) The common law as it existed before any statute made on the point that is in question, the instance given being the liability at common law of tenant in dower or by the courtesy for waste, before the statute of Gloucester extended the like liability to tenant for life as for years.

At page 257, there occurs a question of a somewhat different nature, viz., “How the law of England may be said reasonable that prohibiteth them that be arraigned upon an indictment of felony or murder to have counsel?” And again at page 268, there occurs this equally interesting question, viz., “Whether

it stand with conscience to prohibit a jury of meat and drink till they be agreed of their verdict?" The manner of treating both these questions is at once skilful and naive; and inasmuch as the law of England has been since altered in both respects, the discussion regarding both is particularly pleasing and suggestive. We must refer the reader to the volume itself for these and many other equally grateful discussions, and also for the discovery of the answer to that most mysterious question,—“What *SINDERESIS* is?” and wherein it differs from reason, and from conscience, and from equity.

This American edition is pleasingly got up, and is also annotated with references of a most useful and appropriate character. It is unnecessary to remind the reader that the treatise is one of recognised merit and even of authority in the Courts.

THE LAW OF INSURANCE AS APPLIED TO LIFE, ACCIDENT, GUARANTEE, AND OTHER NON-MARITIME RISKS.—By JOHN WILDER MAY. (Boston: Little, Brown and Company. 1873.)—The object of the author of this work has been, as he himself tells us, “to give within the limits of an ordinary volume such a statement of the Law of Insurance as applicable to non-maritime subject matters as will meet the requirements of those engaged in the various branches of the business, the student, and the practising lawyer.” The work, he says, and we can easily believe him, has been of much greater difficulty than was foreseen. The plan on which the execution of the work has been conceived is thus described in the preface:—“By a studied brevity in the statement of earlier questions which may now be regarded as settled, room has been found to present with considerable fulness, the discussions to be found in the reports upon many of the more recent questions which may be regarded as still undergoing the process of stagnation.” “Considerable fulness,” indeed, has been the order of the day in a number of these modern questions, as, in many instances, our author’s questions extend to page after page of his work. We do not for one moment say that this mode of dealing with a question, namely, by copious quotations from the judgments delivered in important cases, has not its advantages, as in many cases the non-professional reader, and in not a few cases even the professional one as well, may not have access to the original authorities. Still we must own that we think our present author has been a little *too* full in his quotations, and we would suggest to him that in the subsequent edition or editions, which we have little doubt his book will reach, it would be as well to cut not a few of his quotations down to more moderate dimen-

sions. The majority of the cases cited are, as might be naturally expected, decided by American Courts, and the English reader will do well to remember that in many and important points the law of America with regard to insurance is widely different from our English law. Still there are a considerable number of English authorities cited, and under the head of accident, for instance, we find a full, indeed, we feel inclined to say, a too full notice of the case of *Smith v. The Accident Insurance Company*, recently decided by our Exchequer Chamber. As an instance of the extreme fullness of the quotations in which Mr. May is wont to indulge, we may remark that, in a note to his account of this case, the entire clause of the policy which came under discussion, is set out at a length of something like thirty lines in small print, while the point at issue might easily have been brought before the reader with quite sufficient accuracy in some five or six lines. Our author, too, is somewhat too fond as well in his original remarks, as in the extracts which he so copiously selects from the judgments in important cases, of passages of a somewhat rhetorical, not to say, verbose character. Witness the following passage from the second page of the book,—a description of the contract of indemnity,—which we give at length in order to illustrate our meaning (though when we do so we are quite well aware that we lay ourselves open to something of a retort.) “It had its origin in the necessities of commerce, it has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has from time to time with wonderful facility adapted itself to the new interests of an advancing civilisation. It is applicable to every form of possible loss. Whenever danger is apprehended or protection required it holds out its fostering hand and promises *indemnity*. This is the fundamental principle which lies at the basis of the contract, and it can never, without violence to its essence and spirit, justly be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage. ‘Though based upon self-interest,’ says De Morgan, ‘yet it is the most enlightened and benevolent form which the projects of self-interest ever took. It is, in fact, in a limited sense and a practicable method, the argument of a community to consider the goods of its individual members as common. It is an argument that those whose fortune it shall be to have more than an average success shall resign the overplus in favour of those who have less. And though it has, as yet, been applied only to the reparation of the evils arising from storm, fire, premature death, disease and old age, yet there

is no placing a limit to the extensions which its application might receive if the public were fully aware of its principles, and of the safety with which they may be put in practice.' ' Our author has fallen into a curious oversight with regard to the law on the subject of re-insurance as now existing in England. He writes as if the 27 and 28 Vict. cap. 56 had never been passed, and as if the 19 Geo. II. cap. 37 (which extended only to maritime risks by the way) were still in force. He seems, moreover, to be in complete ignorance of a good deal that has been doing lately on the subject of insurance. He does not bestow the slightest notice on the provisions of the Married Woman's Property Act, 1870, with regard to policies, and that though he devotes several sections to the position of married women in relation to insurance, and we have searched in vain through his work for the faintest allusion to the extremely important doctrine of novation, which occupied the attention not only of the ordinary Chancery Tribunals but also of Lords Cairns and Westbury in the *Albert* and *European* arbitrations, and, moreover, has been made the subject of express legislative enactments. These are somewhat grave defects of omission. Still we think Mr. Ma's work may be recommended as a useful contribution to insurance literature.

LOCAL GOVERNMENT AND SANITARY LAW REFORM: An Address, delivered at the request of the Manchester and Salford Sanitary Association. By JOHN LASCELLES, Esq., Barrister-at-Law. (London: Simpkin, Marshall & Co. 1874.)—When we know that tens of thousands of Englishmen are swept into eternity every year by infectious diseases, and that, with proper precautions, probably three-fourths of the infection might have been prevented, we heartily welcome any contribution which endeavours to stir up slumbering easy-going respectability into some consideration for the lives of others, if only for its own protection. Mr. Lascelles had the advantage of addressing an educated and intelligent audience upon the Public Health Act of 1872, and although the lucid exposition of the various defects in Mr. Stansfeld's Bill must have been appreciated by the medical gentlemen present, we congratulate the lecturer in having decided on giving his opinions a wider circulation. We shall not endeavour to criticise the pamphlet before us, but rather endeavour to point out the principal points, which the reader will find amply discussed by the author.

The constitution of Local Sanitary Authorities: the areas which should be under their jurisdiction, and the powers which should be vested in them by the Legislature are first considered.

Mr. Lascelles urges that to reduce the necessity of central supervision to a minimum, the area of each local authority should be large enough to enable it to safely disregard private interests and prejudices. He recommends the administration of our sanitary laws by County Boards (towns of 250,000 inhabitants ranking as counties), the larger counties being divided into convenient districts, placed under the *immediate* jurisdiction of sub-committees, but being under the supervision and final jurisdiction of the County Boards themselves. The Boards would be elected by the ratepayers, with certain *ex-officio* members.

The qualification, appointment, duties, remuneration, and tenure of office of Medical Officers of Health, are next very fully argued. The conduct of the local authorities in refusing to accept money voted by Parliament, because it would have necessitated the appointment and retention of the Medical Officer being taken out of their hands, is condemned with much force. In many places, in our opinion, the appointment of the Medical Officer is little less than a pitiful evasion of the law. Medical Officers must be entirely free from the trammels of private practice, and when once appointed, irremovable, except for misconduct or proved incompetence. The last point Mr. Lascelles brings to our notice is, the measures which should be taken to prevent the spread of infectious diseases, and among other proposals are these: that in all cases of fever or other infectious disease, notice shall be given by medical men attending the sufferers to the sanitary authority, who shall give directions for disinfection, and certify that their orders have been carried out. We sincerely trust that whether Mr. Lascelles' scheme be, or be not, carried into effect in any new enactment, the statesmen of the future will not endeavour to bring in a second Public Health Act constituted to please everybody in theory, but which in practice leaves the physical well-being of the working classes in the hands of sanitary authorities, who owe their position neither to their wisdom nor to their ability, and who, were not elected to exercise the powers vested in them by the legislature, for the promotion of the health and happiness of the people; but to interfere as little as possible with the interests of the owners of cottage and other property, and to save the pockets of the ratepayers,—elected, in fact, to make sanitary legislation abortive.

TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE—NORWICH MEETING, 1873. Edited by C. W. RYALLS, LL.B. (Cantab), LL.D. (Lond.), General Secretary to the Association, Barrister-at-Law. (London: Longmans,

Green and Co., 1874.)—The Transactions contain, as usual, a large collection of addresses, papers, and discussions on legal and social subjects. Confining our attention to the portion of the volume which relates to Jurisprudence and the Amendment of the Law, we would specially call attention to the address of Mr. Joseph Brown, Q.C., which contains many just and striking views on the great question of Law Reform. Mr. G. W. Hastings presents several valuable suggestions with respect to prisons and the prevention of crime. On the latter subject there is also an able address by Mr. O'Malley, Q.C. There are papers and discussions on the Assimilation of English and Foreign Commercial Law, the Framing and Passing of Acts of Parliament, and the changes which have been recently proposed in the Law relating to Agricultural Tenancies. Although we certainly demur to some of the opinions propounded by the writers and speakers on these matters, we yet fully acknowledge that much important information has been brought forward which cannot fail to be highly useful for the final settlement of such questions. Among the papers connected with the Repression of Crime, we may mention one by Sir Willoughby Jones, Bart., on the improvements necessary for the Administration of Justice in Petty and Quarter Sessions, as deserving attention. There is also an interesting paper by Mr. J. A. Bremner on the System of Discipline in County and Borough Prisons. Various other subjects are treated of more or less fully, and there is a practical tendency generally which it is desirable should be always kept in view in such discussions by writers and speakers. It is obviously quite a mistake to suppose that a Social Science Congress is only an arena for the discussion of crotchets and theories. Our impression from such a volume as this is, that the spirit which prevails at such gatherings is entirely practical and utilitarian, and that anything of a different character would be found to be out of place. This is certainly what the jurisprudence portion of the volume suggests, and the rest of its contents, so far as we are able to judge, would seem fully to support a similar view.

A GUIDE TO SOLICITORS ON TAKING INSTRUCTIONS FOR WILLS.
By JAMES RAWLINSON, Solicitor.—(London: Stevens & Sons. 1874).—This is a most convenient little volume of 80 pages or so, containing many practical suggestions expressed in a practical way, and also setting forth the statutes and parts of statutes bearing upon the subject of wills. "In taking instructions for wills, a solicitor should obtain particulars of the testator's property of every kind, whether in possession, reversion, remainder, or ex-

pectancy ; also, of any property over which he has any general or special powers of appointment. He should state accurately what liens, mortgages, charges, or incumbrances affect such property, or any part thereof." Apparently, also, the solicitor ought to explain to his testator the short effect or effects of about half a hundred Acts of Parliament which exercise either an extensive or a restrictive influence upon wills ; in fact, all about investments, all about mortgages, and the disturbance of the natural equilibrium which Locke King's Acts occasioned ; also, all about powers of sale or powers whether express or statutory, all about Lord Langdale's changes effected by the New Wills Act, and all about the maintenance, education, and religious training of children, legitimate or other, (combining, we presume, with females a very natural delicacy and simplicity) ; also, all about charities and the Mortmain Acts, restrictive and relaxative ; and, finally, all about contingencies, perpetuities, hotchpot, and other seasonable collations. While amused rather at the extent of the domain over which the solicitor must travel with his client, and while recommending to the notice of the advocates of female education the vast area of instruction a *testatrix* ought to receive from her solicitor, we are bound, in justice to the author, to say that his book is an admirable *vade-mecum* for solicitors themselves, especially those that are young in the profession. We know of no compendium so handy, and, let us add, so entirely accurate.

THE JOINT STOCK MANUAL, a Handy Book of the Practice of the Joint Stock Companies Registration Office, containing full and detailed Instructions for obtaining Incorporation under the Companies' Acts, 1862 and 1867. By SAMUEL HAYMAN, of the Office of the Registrar of Joint Stock Companies in England. (Printed at the Office of the *Mercantile Review*).—Already a second edition of this really valuable Manual has been called for, and we congratulate Mr. Hayman, not only because he has found a public ready and willing to buy his book, but also for the reason that the second is a marked improvement upon the first edition of the work. With this book in hand the promoter of, or Solicitor to, any Public Company should be perfectly at ease. His labours will be lightened, and what is hardly less important, cheapened. Many books contain valuable information, but the difficulty consists in finding it. We have rarely seen an "Index" so carefully compiled as the present one. The importance in a book of this kind of having a good "Index" cannot be over estimated, as it is simply a "Manual," and with this in hand, every information is

readily procurable. We cannot doubt that with its improved and cheapened form the present edition will be a great success, and if in addition to the cases collected, the leading and modern cases upon points as they arise should continue to be inserted, the growing importance of the work will, we think, be considerably appreciated. In fact, we are so impressed with the utility of the work, and the power it discloses for close application, and intelligent industry, that we cannot doubt it will become a property of value to its author, and a work of the utmost utility to the public. Our readers may remember that we reviewed at some length the first edition of the work—we do not consider it now more than necessary to call public attention to the fact, that a second edition is now in the market, and we venture to say that the volume before us without pretending to to be a legal work, or to trench on fields already occupied by legal treatises, is one that will be found of the greatest utility not only to the profession but to the *investing* public at large.

THE SUPREME COURT OF JUDICATURE ACT, 1873, with Explanatory Notes, by FREEMAN OLIVER HAYNES of Lincoln's Inn, Barrister at Law, (London: Maxwell and Son, 1874.)—We need scarcely say that the Notes of Mr. Haynes are extremely valuable, and that the work is an important contribution towards the elucidation of the Supreme Court of Judicature Act. The Act is printed in the same manner as the copy sold by the Queen's Printer, though of smaller size, and the Editor's notes are inserted on interleaved paper. As these notes do not cover the whole space, the form of the book is convenient for adding any fresh views or suggestions as to the effect of the various enactments of this most complex and elaborate statute. Although Mr. Haynes has pointed out some provisions which seem to him to be erroneous, he ventures to say, "that on a careful study of the Act he has experienced a gradually increasing admiration at the skill, labour, and forethought embodied in it." Within our present limits it would be quite impossible to discuss the different views brought forward by the Editor, but we may state generally that we agree with him in the construction he has put upon the various provisions of the Act, except in a few cases where perhaps any construction would be doubtful until the new Rules, which were intended to be supplementary and explanatory, appear. We may mention as particularly deserving of attention the Notes on section 24, which provides for the concurrent administration of law and equity, those on section 25, which contains enactments upon certain points partly amending and partly declaratory, and those on

the Rules of procedure. No one is better qualified than Mr. Haynes to pronounce an opinion on all such matters, and he has done so here in a very clear and terse manner. In dealing, however, with all the provisions of the Act, he has thrown much acuteness in interpretation and much skill in deducing consequences. In many cases he has pointed out results which the framers of the Act appear to have overlooked. Thus, in a note on the proviso in section 8, that no judge shall be required to take the degree of Serjeant-at-Law, he says, "The visitatorial authority exercised by the judges of the Common Law Courts over the Inns of Court made the practice of disconnecting them from their Inns, on appointment as judges, a convenient one, and the operation of the Act, in this respect, may deserve consideration." Again, in a note on section 12, which provides for duties of judges not incident to the administration of justice in any Court, he says, "The words *not incident to the administration of justice, &c.*," are the key-note of this section, which will probably be held to transfer to the Judges of the High Court, including those of the Chancery division, who are Benchers of their respective Inns, the visitatorial powers hitherto exercised over the Inns of Court by the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer." Unless, therefore, it is intended, by legislative enactment, to abolish the Inns of Court, or to alter entirely their construction, it would appear to be necessary to appoint some other visitatorial authority, or to disconnect the judges for the future from their Inns on appointment.

THE GAOL CRADLE—WHO ROCKS IT? (Strahan & Co. London, 1873).—Whatever opinion we may have as to the fitness of the title of this work, we have no hesitation in saying that the ideas contained in it are worthy the careful and earnest consideration of statesmen, philanthropists, and ministers of all faiths. The chief object of the book is to enforce the idea, that the actual mission of gaol, is to select the strongest natures of the neglected young and work on them a *bad* transformation; that its actual mission is, in short, to rock its own cradle. As a kindred subject—the main reel from which the dark thread of crime is spun—the inoccupation of the young of the poor, forms a part of this book; and the subjects of poverty and laws for poverty, because affecting the morale and chances of the children of poverty, have a minor place. The writer, in his preface, laments the want of opportunity for more extensive observation, but "while persons who at once have authority to speak, and lack the liberty to do so," are muzzled by our governmental system, we hail with

delight any writer who has made a study of the terrible national disgrace—juvenile crime. But “little know the general public,” says the writer, “of what is done with juvenile offenders—strangers to lock-ups, police courts, laws and gaols, and with perhaps a vague idea that the whole apparatus of crime is necessary to the theoretic order of the state, they know nothing of actual processes and results; yet the public are entirely responsible.” Two hundred and fifty dozen children a year are pushed on through London Courts alone from street to gaol. These hundreds, and throughout the country, thousands, of juvenile criminals are the puzzles of our Magistracy. We have heard a stipendiary Magistrate remark to the parents, who so frequently complain of their children, “Why do you bring such a boy before me; do you think that if my boy committed such an offence, I should have him locked up and sent to prison to make a better man of him? Try a little more patience, teach your child to love as much as to fear you, set him a good example, then you won’t find any necessity to send him to pick oakum among hardened felons, to make a good man of him.” Our author proposes to relieve the Magistrates entirely of juvenile crimes, and to constitute an entirely new tribunal consisting of men specially appointed and qualified, who would deal with the offences more as against School discipline, than as against the laws of the country. In this and in many other points the writer is a-head of public opinion, but upon one, and that, in our estimation, most important, he still lags with the crowd. It is in that fatally popular notion that the State, rather than the parents, is responsible for the training of the children. The education of the children of the poor is so provided for in the present day, that the father will scarcely see his boy from year’s end to year’s end. All the week long the father starts early to work, and by the time he returns home, the child is, or should be, in bed; if he is not, he will be out in the street so as not to “bother father.” On the Sunday, the Sunday School provides that, except at meal times, the parents are released from any “botheration,” and so until the child is old enough to go to work, he never comes under the father’s eye or discipline, beyond receiving a severe corporal punishment occasionally, at the complaint of his mother. Public morality among the working classes entirely acquits the father of neglect of parental duties, if he has only thrashed his boy sufficiently frequently. It is the deepening of parental responsibility rather than an increase of industrial schools in this country that will make the young, good workmen, and above all, good citizens. This

is at the bottom of much of our large poor rates. The neglected child, in its turn, neglects his parent, and leaves him to be supported and buried by the parish. These thoughts bring us to the second and third portions of the book—inoccupation and poverty. Of inoccupation we have little belief in the "willing to work and no chance" theory, but yet we gladly admit industrial training to be necessary, and that it should be part of our national education. Educationalists should remember that while every skilled labourer can obtain work, even if he cannot spell, hundreds of so-called educated men are seeking employment or accepting wages which the artisan would disdain. The "Poverty" Section of the Gaol Cradle deserves consideration, containing, as it does, the germ of a system of self providence, which though many may at first sight consider impracticable, even yet promises something like a solution of the great out-door relief question. Our space compels us to relinquish any thing like a complete criticism of the Gaol Cradle. We can commend it most highly to our readers, with but one word of caution, that they should not accept all the statements as facts, but allow something for the pardonable poetic license of a, perhaps, too zealous author.

THE TRAMWAYS ACTS OF THE UNITED KINGDOM. By HENRY SUTTON, B.A., of Lincoln's Inn, Barrister-at-Law. (London: Stevens & Sons. 1874.) This is likely to prove a very useful manual. It is carefully compiled, and diligently revised. We find few errors in it, and, farther than that, we find a good deal to praise. The introduction is interesting and the description of the proceedings before the Committees, and decisions of the referees with respect to *locus standi*, is succinct and useful. We cannot but think that Tramway Law will become more and more important day by day. The Tramway system is extending its limits very rapidly, and there seems every reason to expect that as such towns as London, Liverpool, and Manchester go on spreading out their vast populations more and more, the increased necessity for through communication between the various parts of those vast centres of population will be the means of bringing about the adoption of tramways in many places which are as yet without them. Centralization of population was a way of making itself public. Centres get so huge that they cease to be centres, and the only way to continue the advantages of centrality in such large towns, is by making the means of intercommunication as easy as possible. The adoption of tramways is one means to this end. But now we hear that steam tramway cars are tried and are likely to be used on some of the lines,

which will make this system even more useful than it is at present. But the importance of law is indirect proportion to the importance of the interests which its rules protect, and there can be no doubt as to the importance of the law of tramways or the advantages of having such a careful little work as that which Mr. Sutton has supplied.

REPORTS OF CASES RELATING TO LETTERS PATENT.—By WILLIAM HUBBELL FISHER, vol. 1. (Cincinnati, Robert Clarke and Co. 1873).—This is a volume of the cases decided upon the law of Letters Patent for Inventions in the Supreme and Circuit Courts of the United States, and is apparently intended as the first of a series of reports which shall form a continuation of Robb's Patent cases and Fisher's Patent cases. The head notes and statements of fact have been both very carefully prepared and revised; and all the material portions of the specifications of patents involved in controversy have been inserted, together with numerous engravings very cleverly executed illustrative of the various mechanical devices, and calculated to render the written descriptions at once intelligible and capable of application to other cases. The volume is accompanied with a very full and complete index of the points decided in the reported cases.

AMERICAN TRADE MARK CASES.—Edited by ROWLAND COX Counsellor at Law (Cincinnati, Robert Clarke & Co. 1871.) This work is a compilation of all the trade-mark cases decided in the American Courts prior to the year 1871, and is accompanied with an appendix containing the leading English cases upon the same branch of law. The cases are arranged in chronological order, and are given (subject only to a few alterations of a necessary or convenient character) in the language of the original reporter. Equally, therefore, to the English and to the American reader, it presents the advantages at once of a text book and of a volume of reports—the arrangement which has been adopted being probably the safest and most satisfactory one for the treatment of such a subject. The volume concludes with an index, which is very carefully prepared, and which serves as a ready means of referring to the principles of the law contained in the volume and also of collating the different cases with each other.

SUPPLEMENT TO THE INDEX TO THE STATUTES (Second Edition), containing additions and alterations consequent on the legislation of the Session of 1873, 36 and 37 Vict. By authority. (London: Eyre & Spottiswoode, 1874.)—Briefly this is an alphabetical index

of the legislation of the late session, and a very useful supplement to the index of the statutes. Under the various heads, which are exhaustive of the subject matter they concern, are given the course of legislation adopted, whether in the passing of new Acts or repeal, or partial repeal, of old ones. By the paging in the margin easy reference is afforded to the volume of statutes. The supplement will be continued annually, and we have no doubt will be a great acquisition to the profession, the politician, and the public.

THE BENCH AND THE BAR REVIEW, No. 1. (Baltimore, U.S.A. 1874).—The above is the title of a new legal quarterly, devoted exclusively, as the announcement says, to the wants of the profession. To the English reader it contains two very interesting articles—one on “The Bar of England and France,” and the other on “The Civil Law.” There are others of less importance and peculiarly adapted to the requirements of native taste. These, with notes of recent decisions of the United States Courts and our own, make up a very fair specimen of a legal journal.

THE *ELECTION MANUAL: a concise digest of the Law of Parliamentary Elections. — By L. P. BRICKWOOD, M.A., and HERBERT CROFT, M.A., of the Inner Temple, (London: Virtue, Spalding, and Davy, 1874.) This work has come out at a seasonable opportunity. The late dissolution of Parliament rendered some such work not only requisite but welcome for practical purposes, it in fact, afforded a reason for its appearance. The book is divided into seven parts, so far as the law is concerned, on the following subjects, namely, Bribery, Agency, Candidate, Conveyance of Voters, Corruption, Influence (including intimidation), and Treating. The work is pretentious neither in form nor in title, and, though a kind of digest of decisions, it fails to carry out the recommendation of Mr. Justice Blackburn of a “code.” As to the former it is convenient; as to the latter, it is called a manual, and a manual it is. There is no abundance of original matter in it, but there is a most full and convenient arrangement of the law of the subject as expounded by the election judges on recent occasions. We would not fail to observe also that not only are the English decisions noted, but also those of the Irish judges. The work gives the recent law in a convenient and readable form, and it possesses the additional advantage of an excellent index, voluminous, and easy of reference. In the appendix is given the decision, in January last, of Mr. Justice Grove in the Taunton Election Petition.

CALLS TO THE BAR.

Easter Term, 1874.

LINCOLN'S-INN.—Charles Robert Alexander, B.A. Cambridge; Lewis Charles Sayles; Thomas Haines Revington, B.A. Cambridge; William Frank Jones (exhibition, July, 1871, C.L.E.) B.C.L. and M.A. Oxford; Charles Ernest Thynne, late of Christ Church, Oxford; Charles Woodd Fox, B.A. Oxford; Peter Quin Keegan, B.A. and LL.B. Queen's University in Ireland; Isaac Spencer Cox, University of London; James Henry Stronge, B.A. Oxford; John Marshall, B.A., Oxford and M.A. Edinburgh; Charles Edward Nesham, B.A. Cambridge; Sydney Edward Williams, Christ's College, Cambridge; the Hon. Claud Hamilton Vivian; and James Russell, M.A. and LL.B. Queen's University in Ireland.

INNER TEMPLE.—Alfred Henry Burton, M.A. Cambridge; Arthur James Rickens Trendell, London; William Erskine Foster, B.A. Oxford; John Gilbert Kotzé (holder of an exhibition awarded July, 1872), LL.B. London; Adam Gordon Duff, B.A. Cambridge; the Hon. John Augustus De Grey, B.A. Cambridge; Frederic William Sim, M.A. Oxford; Ananda Mohan Rose, B.A. Cambridge; Frederic Charles Norton, B.A. Cambridge; Benjamin Gibbins, London; Earnest James Myers, M.A. Oxford; Andrew Noel Agnew, LL.B. Cambridge; the Hon. Josceline George Herbert Amherst; Julian Robinson, B.A. Oxford; Francis Macredie Bowen; Frederick Harold Kerans; Thomas Erskine Baylis; Clarence John Peile, B.A. Cambridge; Walter John Grubbe, B.A. Oxford; Alexander Monroe, B.A. Oxford; Augustus Abraham James Stewart; George Harty Haigh; Ernest Edgar Montagu, B.A. Oxford; Francis Robert Morrison; Samuel Louis Graham Sandberg, B.A. Dublin; and Francis Wentworth Brewster, Cambridge.

MIDDLE TEMPLE.—Henry Barr Tomkins, Trinity Hall, Cambridge, LL.M.; Alexander Young, Christ Church, Oxford, B.A.; the Hon. Frederick Charles Moncrieff, New College, Oxford; Andrew Henderson Leith Fraser, University of Edinburgh, M.A.; Colonel Henry Evelyn Wood, C.B., V.C.; Arthur Collard; Captain Thomas Jessop, Trinity College, Cambridge, M.A.; Joseph Samuel Edge, Trinity College, Dublin, B.A.; Sydney Peel, Trinity College, Oxford, B.A.; Charles Frederick Gill; James Godfrey Pearson, Trinity College, Cambridge; John Kirkwood Leys, University of Glasgow, M.A.; and Clement William Govett.

GRAY'S-INN.—Charles Lyttelton Chubb, B.A. Sydney, Sussex College, Cambridge.

BAR EXAMINATIONS.

Easter Term, 1874.

HINDU AND MAHOMMEDAN LAW, AND LAWS IN FORCE IN BRITISH INDIA.—The Council of Legal Education have awarded to:—Montagu Clementi, Esq., of Lincoln's Inn, a certificate that he had satisfactorily passed an examination in the subjects above mentioned.

GENERAL EXAMINATION.—The Council of Legal Education have awarded to:—John Channon Lee Bassett, Esq., of the Inner Temple; Anada Mohan Bose, Esq., of the Inner Temple; John Brumell, Esq., of the Middle Temple; Sebapathi Iyah Cumbumpati, Esq., of Lincoln's Inn; Ernest Eiloart, Esq., of the Inner Temple; Ernest Badinins Florence, Esq., of the Middle Temple; William Erskine Foster, Esq., of the Inner Temple; Graves, Samuel Haughton, Esq., of the Inner Temple; Edward William Hawker, Esq., of the Inner Temple; Arthur Jepson, Esq., of Lincoln's Inn; Charles Edward Jones, Esq., of the Inner Temple; Ashley Henry Maude, Esq., of Lincoln's Inn; Douglas Metcalfe Metcalfe, Esq., of the Inner Temple; Thomas Stewart Omond, Esq., of the Inner Temple; Thomas Alfred Spalding, Esq., of the Middle Temple; and Robert William Taylor, Esq., of the Middle Temple; certificates that they have satisfactorily passed a public examination. The Council have also awarded studentships in Jurisprudence and Roman Civil Law, of 100 guineas, to continue for a period of two years, to Robert William Taylor and Richard Meares Sly, of the Middle Temple; and a studentship in Jurisprudence and Roman Civil Law, of 100 guineas, for one year, to George Edward Septimus Fryer, of the Inner Temple.

APPOINTMENTS.

Mr. A. Stavely Hill, Q.C., M.P., has been appointed Deputy High Steward of the University of Oxford; Mr. E. M. E. Welby, Stipendiary Magistrate of Sheffield; Mr. J. H. Graham, solicitor, has been appointed Chief Clerk to the Lord Mayor at the Mansion House Justice Room; Mr. Thomas Lamb, Clerk of the Peace for the Borough of Andover; Mr. Arthur Ireson, jun., Clerk to the Justices of the Peace for the Borough of Kingston-upon-Hull; Mr. A. O. L. Glubb, Coroner for Liskeard; Mr. William Wallis, solicitor, Coroner for the Borough of Newark. *Trinidad.*—Mr. Henry Ludlow has been appointed Attorney-General.

THE LAW MAGAZINE AND REVIEW.

No. VII.—VOL. III.—JULY, 1874.

ON THE ABOLITION OF IMPRISONMENT FOR DEBT.*

By PROFESSOR LEONE LEVI, F.S.A., F.S.S.

ONE of the most difficult problems of practical legislation is how to reconcile the claims of private right with proper regard to the interest of the great community. The interest of the people in the aggregate, said Bentham, in their character as suitors, is that as few debtors as possible should go to gaol and that as little as possible of the mass of property at the disposal of the judges should perish, or be lost to the parties entitled to it. Yet, for debts comparatively of an insignificant amount, 7,000 to 8,000 persons a-year are still imprisoned by county-court judges, and all they have and all they might earn, at least during the time of their imprisonment, is thereby lost to themselves, to the creditors, and to the entire community. For the protection of a foreign trade, amounting to some £600,000,000 a year, of a home trade of twice or thrice that amount, of bills of exchange and promissory notes constantly in circulation for some three hundred millions, and of cheques cleared at the clearing-house of some five thousand millions a year, imprisonment for debt has been abandoned. For the protection of credit in the smallest transactions, a large portion of which is absolutely prejudicial to the parties interested, imprison-

* A paper read at a recent meeting of the Law Amendment Society.

ment is still practically maintained, and the simple threat of the same is deemed to be its best security. Montesquieu said that in civil suits the law should not grant imprisonment for debt, because the freedom of a citizen is of more importance than the welfare of another, but that in commercial suits the law should consider the public good of more consequence than the freedom of the citizen. Singularly enough, British jurisprudence has pursued precisely the opposite system. Whilst it has abolished imprisonment for debt for the protection of transactions of a commercial character of £50 and upwards, it has retained it for transactions generally of a civil character for sums below that amount. Is it right, is it expedient that the present system of imprisonment for debt should be maintained?

Doubtless, it is one of the first duties of a civilized State to maintain private right and to uphold the sacredness of private contract. If it be found, however, that as a remedy imprisonment for debt exacts more than is adequate to the protection of the rights of the creditor, and consequently than he is entitled to have, that it has a tendency to confound a civil with a criminal wrong, the debtor being kept in the common gaol with the malefactor, that the exercise of such remedy is attended with considerable expenditure, often exceeding in amount the sum claimed, that it is liable to great abuse, and that it is productive of evil rather than good to large numbers of the people, then it becomes the bounden duty of the State to refuse such a remedy. Imprisonment is no part of the contract, and simply to release the prisoner would not impair its obligation, but leave it in full force against his property.

Judging from the persistency with which the Legislature has now for many years sought to abolish imprisonment for debt, and the abuses of which have been so well exposed by the prince of modern novelists, we might have expected that the system had long ago been abandoned; but reforms ripen very slowly, and after what has been done in this direction there is yet a modicum of abuse which needs a bold hand to sweep

away. According to the old law, not indeed the common law, for at common law there was no remedy for simple debt beyond attaching the debtor's goods, but by statute dating from the commencement of the sixteenth century, a debtor was liable to be arrested by a creditor upon an affidavit made by any other person—it might have been his own clerk—that the debtor owed him £20. It was entirely an *ex parte* proceeding, and it was in prison, and as a culprit, that the debtor had to wait for the judgment, though at that time imprisonment extinguished the debt. Happily, one of the first benignant Acts passed soon after the accession of Her Majesty (1 & 2 Vict. c. 110) was to abolish arrest or mesne process, and to place imprisonment for debt at the discretion of the court rather than at the caprice of the creditor. In 1844, by the 7 & 8 Vict. c. 96, imprisonment on final process for a debt not exceeding £20 was abolished, except in case of fraud. One year after, by the 8 & 9 Vict. c. 127, power was given to the court in cases of judgments not exceeding £20 to summon the debtor to show cause why he should not be committed for disobeying the order of the court. And when the County Courts were established in 1846, by the 9 & 10 Vict. c. 95, with a jurisdiction over claims up to £50, imprisonment was allowed to be granted in either of the following five cases, viz.—If the party summoned should not attend as required; if, attending, he should not disclose his estate and effects; if it should appear that he had obtained credit under false pretences or by means of fraud or breach of trust; if he had made away with or concealed his property, or if it should appear to the satisfaction of the judge that the party so summoned has or has had, since the judgment was obtained against him, sufficient means and ability to pay the same, and that he refuses or neglects to do so, pursuant to the order therein contained, whilst in no case imprisonment was to extinguish the debt. In 1859, by 22 & 23 Vict. c. 57, imprisonment for failure of attendance at court was abolished. In 1861, when insolvency and bankruptcy were amalgamated, all persons imprisoned for debt were enabled to

obtain their discharges from prison through the court of bankruptcy. And in 1869, by 32 & 33 Vict. c. 62 again the Legislature pronounced itself definitively for the abolition of imprisonment for debt, except, however, in cases where it is "proved to the satisfaction of the court that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." Other exceptions to the abolition of imprisonment for debt were made by that Act, as in default of payment of a penalty or of a sum recoverable before a justice of the peace, or for payment of costs, as in matters of bankruptcy; but those relating to fraudulent acts, included in the statute of 1847, were not re-enacted, partly because they came under the provision of the Fraudulent Debtors' Act of the same year, and partly because they are already met by the criminal law.

It is difficult to say what is the real ground on which imprisonment for debt is *now* defended. When slavery was a recognized institution the debtor was made to answer in his person for his engagement, and his body was given in pledge for his debt. By the Roman law of the Twelve Tables it was ordained that insolvent debtors should be given up to their creditors to be bound in fetters and cords, whence they were called *Nexi, Oborati, et Addicti*. But since slavery ceased, the creditor can no longer either sell the debtor as an indemnity or command his labour as compensation. This ground, therefore, has utterly failed. For purposes of precaution, lest the debtor should evade the performance of his obligation, imprisonment for debt might seem more reasonable, but a means of coercion solely applicable to crime ought never to be applied to the mere non-payment of debt, which, till otherwise proved, may be the result of simple misfortune or of causes beyond the control of the debtor. As a means of compulsion, also, imprisonment for debt is often unjustifiable, since the law ought never to compel the performance of what may prove an impossibility. If imprison-

ment for debt should seem effective as a means of coercion, from the fact that in many cases the simple threat of imprisonment induces the performance of that which would be otherwise withheld, it should be remembered that often a debtor, to satisfy his judgment creditor, is constrained to borrow money at ruinous rates, whereby he gets into still greater trouble and distress, and that still more frequently, the creditor, after having obtained his warrant of commitment, finds it useless to carry it out; for what good is it to him to put the debtor in prison, if the debtor has really nothing to pay? The probability, indeed, is that only in a very few cases the commitment is effective in extracting payment from an unwilling debtor. But the coercive character of the present imprisonment for debt is after all disavowed. Its object, as contemplated by the County Courts, is not coercive but absolutely penal, for it is awarded against a debtor, not for the non-payment of the debt, but for the contempt of court, for his defiance both of his legitimate creditor and of the law in the fact of his having money to pay and not paying it. And for this, two reasons have been adduced. The first is the necessity of strengthening the sanction of the law. The second is to punish fraudulent and semi-fraudulent acts. If this power is necessary for the efficiency of the judgments of the County Courts, it is strange that like powers are not also asserted by the superior courts, or even by the Bankruptcy courts. And as to the punishment of fraudulent acts, that is surely the province of the criminal court, and not of courts for the settlement of civil disputes. In how many cases, however, is this so-called contempt of court any more than a simple fiction? In practice, it seldom happens that a man has money in his hand and will not open it to pay it out. It is far more the case of a man who ought, in the opinion of the judge, to have had sufficient to pay his debt, and yet has not paid it. The question really is not whether he is able to pay with what he has, but whether he ought to have paid, or may be made to pay, with what he might have had or may yet have?

The *onus* of proving that the debtor has the means to pay resting, moreover, with the creditor, the debtor being generally absent, the proof is of necessity very loose, and the judge has not always the proper means to estimate the real circumstances of the debtor, what other debts he might have, or what other judgments there may be against him. There is indeed reason to believe that the judges are often mistaken in their estimates of such circumstances. Mr. Atkinson, the learned judge of the Halifax County Court, is reported to have admitted that a man is sometimes sent to prison without sufficient care being taken by the presiding judge that the evidence shows satisfactorily that the man could if he would pay the debt. Mr. Nicol, the superintendent of county courts, had no doubt that many debtors who have not the means of paying at the time, are sent to prison. Let it be remembered that the fact that the debtor is in the receipt of certain wages is only one item in the proper appreciation of the means at the disposal of the debtor. In estimating the extent of such means it is necessary to take into account his outgoings as well as his incomings. Doubtless in many cases, by self-control and self-denial, such means might be ample not only to satisfy necessary wants, but to pay lawful debts. But there are cases also where high wages may go hand-in-hand with sickness, a large family, or needy friends, which soon absorb any apparent surplus. It is, moreover, doubtful whether there was ever any intention in the Act to give judicial power or discretion to take into account the future earnings of the debtor. And there is an apparent incongruity, if not injustice, in the fact that whilst a small debtor is often ordered by the judge to pay the debt by instalments out of his future earnings to the last farthing, subject to his being sent to prison for non-compliance with the payment of every one of such instalments, the larger debtor in the court of bankruptcy, by sacrificing everything he has, and paying ten shillings in the pound, is free as to his future earnings, and, whether paying ten shillings in the pound or not, is always free from impri-

sonment, except indeed in case of fraud. From whatever view we examine it, imprisonment for debt, as now exercised by county-court judges, is really both coercive and penal in its character, and practically maintains imprisonment for debt intact, as if the Legislature had never abolished the same.

Nor is it unworthy of notice that the remedy of imprisonment for debt is too often enforced by parties whose business does not deserve the special countenance of the Legislature. Who are they that come more frequently before the courts as plaintiffs? They are the loan societies or money clubs, who charge enormous rates of interest for the accommodation they render, and who ruin the debtors by their commissions and expenses. They are the Scotch drapers or tallymen, who charge very high prices for their goods, and who, by their house-to-house hawking with fineries, foster improvidence and waste among a class which little needs any prompting in that direction. They are collectors of debts, who speculate on their better power of recovering them by threats and pressure. But few tradesmen avail themselves of the remedy. The upper class of them do not stoop to press their claims to imprisonment. The debtors themselves who appear before the county courts on such summonses are persons of small income, petty dealers, clerks, and workmen. Now and then the genteel and the fashionable doubtless appear, and there are some out of all grades and professions who feel no compunction in refusing to pay lawful debts, who are not ashamed to delay payment till a writ has actually been issued. But these are few. Whilst the greater number of creditors who sue for imprisonment for debt are forlorn creatures often at the verge of starvation.

Whether owing to the power still vested in the county courts to imprison for debt or to any other cause, it is the fact, that, whereas the original scope of the Legislature in establishing such courts was to make them courts for the termination of contentions between suitors, in practice by far the greater proportion of their business consists in the en-

forcement of small debts. The amount of claims for which the machinery of the county court is set in motion is in many cases very small. In 1870, out of 911,753 plaints entered, as many as 594,825, or 66 per cent., were for sums not exceeding 40s., and of these 67,216 plaints were for less than 5s., and 1,340 for sums not exceeding 1s. Of course, under such circumstances, the expenses incurred for enforcing the claims are large, and often exceed the amount recovered. To imprison a person for a plaint of 5s. the expenses are at least 5s. In 219 cases, for sums under 5s. for a total amount of £46 16s., the costs amounted to £36 4s. 6d.

And what is the real amount of benefit which the plaintiffs get by endeavouring to recover their debts through the county courts? In 1872 plaints were entered for a total amount of £2,590,792. Add to this £62,360 costs, £349,266 fees, and at least 5 per cent. other expenses not taxed—£129,000—we have a total claim of about £3,100,000. How much of this has been recovered it is difficult to say. Mr. Daniel, Q.C., the learned judge of No. 11 District County Court, ventured to name £2,000,000, but there is no means of ascertaining the fact. The chances are that it is considerably less. First of all only about one half of the plaints entered are really prosecuted. Out of the total number of claims entered, only 56·8 per cent. were settled in court, and 43·2 per cent. out of court. The number of judgments given for the plaintiffs was 494,713, and the amount for which judgments were obtained was, for debts, £1,282,693; and costs, £61,360: total, £1,344,963. But to get a judgment and to recover the debt are two different things. What amount was paid even upon these judgment summonses without any further step, it is not shown. Mr. Daniel, Q.C., in his letter in the *Times* of the 27th May, gives, however, a clue to the understanding of various facts in the county court returns. Supposing the notes which he appended to his letter explaining the figures for his circuit to apply equally to all the other circuits the following results will arise: In 1872 the total number of judgment

summonses issued was 124,367, and the number heard, 64,992. The difference between these two figures, represents in one-half those judgments not served in consequence of personal service not being effected, and one-half those upon which the debtors paid on being served. Consequently we may take it that 29,686 judgments are effective, and that a similar number failed at the outset. But though 64,992 judgments were heard, no more than 33,823 warrants of commitment were issued, the difference, 31,169 representing those in which, in consequence of the evidence not being satisfactory, no orders were made. When we arrive at this point, we find a difference between 33,823 warrants issued and 6,899 persons imprisoned, and it seems that that difference, 26,924, represents the cases in which the debtors pay or arrange with their creditors on notice of the order. It thus appears, that after the plaintiffs have got 124,000 judgment summonses, only about 57,000, or 46 per cent. proved effective in procuring payment, and 68,000, or 54 per cent., proved abortive of any result. Now this is not very satisfactory when we consider the enormous expenses connected with the county courts. It is certainly worthy of serious consideration whether the whole system might not be more economically administered. As it is, to sustain claims for about £2,500,000, only the half of which are settled in court, the plaintiffs have to put £530,000 for costs and expenses; the State has to pay some £170,000, which is the balance between the amount of salaries and expenses of the county courts and the costs and fees received from plaintiffs; and the ratepayers have to defray the cost of maintaining the defaulters whilst in prison, and often the further charge for the maintenance of the families thereby thrown on the parish.

There are many other circumstances, indeed, connected with the present practice of imprisonment for debt, which are exceedingly objectionable. When a person is committed to prison, say at Leeds or Bradford, he has to be sent to York gaol, at considerable cost of conveyance, and when he

is discharged he has to find his way home, some fifty or eighty miles off, as best he may, either walking or riding. About 7,000 persons were imprisoned for debt in 1872, for an average period, say, of twenty days. Collectively, they have thus wasted in prison 140,000 days, or 383 years. At one pound a-week the loss of labour is £20,000, whilst they have still on their shoulders the entire burden of their debts, with all the cost and interest both on debts and costs. I have taken the average of twenty days from the facts given in Mr. Torrens' return in 1869, but the period for which the commitments are made differs materially in almost every court. In some, seven days are considered sufficient, in others fourteen, twenty-one and thirty days are freely awarded. Any attempt to establish any co-relation between the offence and the penalty under such circumstances is quite out of the question. According to Mr. Daniel's own return, in 1873, two persons were imprisoned forty days each, for two debts of 18s. 8d. and 16s. 9d. respectively. Cheaper far, for the ratepayers of Burnley to pay the debts of these persons than to maintain them so long in prison at the public expense. Under the old Insolvent Debtors Acts, the creditor was bound to contribute towards the prison maintenance of the debtor, and that is the practice in Scotland. Not so now in this country. With much reason it was suggested in evidence by Mr. T. A. Russell, Q.C., the learned Judge of County Courts, that if the creditor had to pay for the transport of the debtor to prison, and for his maintenance when there, imprisonment for debt would be sought very seldom indeed by the creditor.

By far the greatest evil, however, connected with the system is the abuse of credit. A good system of credit is of vital importance, especially to a commercial nation. But a solid credit rests immediately on confidence derived from the knowledge of the debtor's character and ability, and only subsidiarily on the law, which, in case of need, will protect our rights. Alas! for that credit which rests solely or primarily on the force of the law to protect it. Yet that is

the credit fostered by imprisonment for debt. It is an evil, a decided evil, where credit is given simply on the assurance that the fear of imprisonment will be effective in securing the payment of debt. To the debtor, the constant resort to credit, especially for domestic purposes, is pernicious in the extreme. It engenders carelessness and waste. It maintains him in a state of dependence. It causes him to pay inflated prices for what he gets, the prices charged under such circumstances being necessarily increased by the rate of insurance for the risk incurred. Many county court judges defend the present system of imprisonment for debt on the ground that the working classes would be the main sufferers from its abolition. They conceive that without this remedy workmen would not be able to get credit in hard times, when labour is scarce and wages are difficult to earn. And it has even been asserted, that but for this remedy many a man would never be able to enjoy the luxury of a watch in his pocket, and many a woman that of a fine shawl on her back. Away with such phantoms! Never fear but the honest will always be trusted and befriended. And as for the watch or the shawl, the rule should be to save first and spend after. 'There are savings' banks at hand everywhere. Encourage the poor and the humbler classes generally to lay by their surplus, and they will then be able to buy any legitimate luxury they may require at their proper value with ready cash. As it is, by a strange inconsistency, whilst liquors cannot be obtained on credit, an Act of Parliament, 24 Geo. II. c. 40, amended by a more recent Act, the 25 & 26 Vict., c. 38, having abolished the right to recover any debt for spirituous liquors, unless contracted at one time to the amount of 20s. : goods for household purposes may be obtained on credit; and it is often too patent that, whilst the ready money earned is wasted by the foolish husband at the public-house, the bread and butter for the family are purchased by the desolate wife on credit. Far better would it be if the course of legislation on this matter had been just the reverse. If the abolition of imprisonment for debt

should to any extent discourage book-credit for domestic concerns, and above all if it should discountenance credit given for fineries and luxuries, most wholesome certainly will be the result. Its effects will be to cause the lower classes to obtain better and cheaper goods, to restrain the improvident, to foster greater prudence, and to raise the morals of the whole population.

Singular enough, whilst this country has been one of the first to modify the harshness of the criminal law, and to improve the relations between debtors and creditors in the matter of imprisonment for debt, it has been left far behind. In Scotland, under the 5 & 6 Will. IV. c. 70, imprisonment cannot be inflicted for debts under £8 6s. 8d. In France, by the law of 1867, imprisonment for debt was abolished except for criminal offences and matters of simple police, and then, if at the instance of a private individual, at his cost, for the maintenance of the prisoner. In Germany, by the law of 1868, personal arrest in civil suits for non-payment of money was abolished. In Belgium, by the law of 1871, imprisonment for debt was abolished in all civil matters, and even for criminal offences, only where the amount exceeds 3000f. In Italy, imprisonment for debt is not permitted for any sum less than 500f. (£20). In Austria, there is no imprisonment for debt either for large or small sums. In Sweden, by the law of 1868, imprisonment for debt was abolished except where the debtor cannot prove on oath that he possesses no other goods than what he declared to have. In Switzerland, in several cantons, imprisonment for debt is unknown. In Zurich and Geneva it was abolished by a special law, and though in Tessin, Bâle, Valais, Fribourg, it still exists nominally, everywhere it is in process of extinction. In the United States of America, though not abolished, imprisonment for debt is but seldom put in force.

During the last three years the question of imprisonment for debt has been once more brought before the British Legislature. In 1872 Mr. Bass, the hon. member for Derby,

brought in two Bills. The first Bill was to the effect that no action, plaint, or suit should henceforth be maintained in any court to recover any debt or sum of money under forty shillings, allowed to be due in respect of any goods sold after the passing of the Act, other than medicines or medical or surgical appliances, unless such debt should be the balance still owing in account exceeding forty shillings, or should have been *bonâ fide* contracted at one time to the amount of twenty shillings or upwards. The other Bill was to the effect that no person should be committed to prison for making default in payment of any debt, or instalment of any debt due, unless it be proved to the satisfaction of the judge that the debt was contracted by means of false representation, or that the debtor wilfully contracted the debt without reasonable expectation of being able to discharge the same, or has made, or caused to be made, any gift delivery or transfer of any property, or has charged, removed, or cancelled the same with intent to defraud his creditors. The first of these Bills, however, abolishing plaints in county courts for debts under forty shillings, was withdrawn, and the latter, to abolish imprisonment for debt, was thrown out by a large majority. But a Committee of the House of Commons was granted on the subject early in 1873, and its report placed the argument very fully before the public.

In defence of imprisonment for debt, the chief reasons adduced before the Committee were apprehensions of a limitation of credit injurious alike to debtor and creditor; a probable wantonness and defiance on the part of debtors, and consequent injury to creditors, from the removal of a remedy which is supposed to have most deterrent effect. But these reasons were more than met by those in favour of its abolition. The abuse of credit thereby encouraged; the evil of taking from the debtor his freedom to labour, that being the principal means which he can possibly have of satisfying his obligation; the tendency of throwing the burden of his obligations on the earnings of other members of the family,

or of driving the debtor to seek his discharge from them by the contraction of new debts under the shape of loans; the inexpediency of maintaining imprisonment for plaints, three-fifths of which are for sums under forty shillings; the cost entailed on taxpayers and ratepayers in conveying the debtor to gaol, and maintaining him there; the uncertainty arising from the wording of the clause in the Act, 1869, as to what constitutes ability to pay; and the inequality in the term of imprisonment awarded, which varies from seven to ten and fourteen days, up to twenty and even forty days—were one and all urged with great force on the attention of the Committee of the House of Commons, and the result was an expression of opinion on their part that the administration of the law relating to imprisonment for debt by county court judges is unequal and uncertain in its results; that the mode of procedure on judgment summonses does not ensure sufficient evidence of the means of payment of the debtor, especially with regard to his indebtedness to other creditors being brought before the county court judge, before making an order of commitment; that there is inequality in the law in relation to the remedies against debtors for large and small sums, which presses with undue severity upon the latter; that upon the hearing of any judgment summons the debtor should be required to deliver in a full and true account of all the debts due from him, and of his means of payment; that such sums as are ordered to be paid, and the produce of such sales as are made under execution, should be brought into court in order that the same may be distributed rateably among all the creditors; that the county-court judge should have power to commit for non-payment of damages or costs in trespass and other tortious actions, independently of the debtor's inability to pay; that such power should be exercised only once; that such of the provisions of the Debtor's Act, 1869, as relate to fraudulent debtors should be revised, for the purpose of extending the same as far as may be necessary to persons against whom an order, or a judgment-debtor summons, may be issued; and that on such recommendations of

the Committee being adopted, it is expedient that the power of imprisonment for debt, as now exercised by the county-court judges, should be abolished.

Since the presentation of this report, Mr. Bass brought forward in the House of Commons another Bill, to the effect that imprisonment for debt should be exercised only where such order or judgment exceeds £5, exclusive of costs. The motion for the second reading of the Bill by Mr. Bass was ably seconded by Sir Henry James, Q.C., late Her Majesty's Attorney-General, but the Bill was strongly opposed and again thrown out by a majority of 215 to 72. There is no reason, indeed, why an arbitrary limit should be fixed to the sum for which imprisonment for debt should be exercised, though the same fault applies to the law of Scotland, which places the limit at £8 6s. 8d., and to the law of other countries, which places the limit at 300 francs or 500 francs. Why fix any limit, when the Legislature has more than once pronounced itself absolutely for the abolition of imprisonment for debt in all cases except for fraud? The Bill of 1872 was in many respects preferable to that brought in during the present session. What is now required is simply to abolish the clause which permits imprisonment for debt in cases where a person does not or will not pay, though there is evidence before the court that he possesses the means for so doing. From a return obtained by Mr. Torrens of the number of persons taken to prison under the Act 9 & 10 Vict. c. 95 in the two years ended 31st December 1866 and 1857, specifying in each case the ground of the commitment, it would appear that out of 21,670 persons committed, seven were for refusing to answer the questions authorized by the Act; fifty for contracting the debt under false pretences, or by means of fraud; four for making gifts or transfer of property; five for having charged, removed, or concealed part of their property with intent to defraud their creditors, and 21,604 persons, or 99 per cent. of the whole number, for not having satisfied the judgment and costs, the parties having had sufficient

means and ability to do so. Abolish, therefore, that clause and enlarge if need be, the application of the clauses of the Act of 1869, in so far as they relate to fraudulent debtors, by re-enacting the clause to that effect as in the Act of 1846, and we have all that is really required. How far a county court system of bankruptcy could be introduced for debts below £50, would depend on the expense attending the process. There is no reason, however, why a debtor in the county court should be placed in a different position, as regards payment out of his future earnings, than a debtor in bankruptcy. With the abolition of imprisonment for debt in cases where the judge is satisfied of the debtor's ability to pay, with means absolutely in his hand, it may be a matter for consideration whether the law of attachment might not be advantageously altered to the effect of authorizing the arrestment of wages actually due when they exceed £5 in amount—the present limit as to executions. But the expensiveness of the county-court system renders the recovery of small debts by the intervention of the courts utterly futile. Whatever is done, let the abolition of imprisonment for debt be real and not imaginary. It is real with respect to debts exceeding £50 within the jurisdiction of the superior courts, subject to the process of bankruptcy; let it be real also with respect to debts under £50 within the jurisdiction of the county courts. The question before the Society is one of extreme difficulty and delicacy. Whilst on the one hand we have the testimony of almost every one of the learned judges who preside over the county courts, in favour of the retention of imprisonment for debt in the present form, it is impossible, on the other hand, to ignore the fact that the existing system is attended by many evils and objections of a serious character. For my part, after studying carefully the course of legislation on the subject, and the experience of this and other countries, I have come to the conclusion that, in the interest of justice and morals, it is safer, and better to complete what has been so well initiated, and to set at rest once and for ever, the principle of the abolition of imprisonment for debt.

II.—THE *VIRGINIUS*, IN REFERENCE TO THE LAW OF SELF-DEFENCE.*

THE circumstances attending the seizure of the *Virginus* are supposed by some writers to supply an example of a *casus omissus*, for which international law has neglected, or is inadequate to provide. It were strange if this were so, considering that the facts of this case are undisputed, and the principles which underlie them are few and simple. The case itself is, doubtless, fresh in the recollection of our readers. The *Virginus* was registered at New York on the 26th November, 1870, as the property of an American citizen, who made the oath required by law as to ownership. He failed, however, to comply with the provision of the law which requires a bond to be filed, signed by the owner, the captain, and one or more sureties. And there could be but little doubt that the nominal owner was not the real owner, but that the vessel was the property of certain Cuban leaders who supplied the funds for her purchase. She sailed from New York in October, 1870, for the island of Curaçoa, and never after that date returned to the United States. After a few transactions of a questionable kind in which she was mixed up with one of the contending parties in Venezuela, on the 24th October, 1873, she took on board, at Kingston, the leaders of the Cuban expedition, together with a band of men, about one hundred and eighty in number, who had been collected and partly drilled in New York and elsewhere; with this cargo she put to sea, and after touching at some intermediate ports, arrived at Quantonomo, off the Coast of Cuba. Here she was seen and chased by the Spanish cruiser *Tornado*. Seeing that flight was hopeless, orders were given to throw into the sea everything which would indicate

* The Case of the *Virginus*, Considered with Reference to the Law of Self-Defence. By George Ticknor Curtis, New York: Baker, Voorhis & Co. London: Trubner & Co. 1874.

a military expedition; and it was stated that this operation might easily, the night being clear, have been, with good glasses, seen from the deck of the *Tornado*. This done, however, she surrendered; the Cuban leaders supposing that the American papers which the vessel had on board, and the American flag under which she sailed, would have afforded them protection. The subsequent history and the putting to death by the authorities, at Santiago, of a large number of those on board, is well known.

There can be no doubt but that this case presents considerations of some difficulty, which do not disappear, but rather gain force the more they are examined. How, for example, can the right of visitation and search—a purely belligerent right—be legitimately exercised at a time when no state of formal war exists? What is the conclusive effect as determining a ship's nationality of a flag and papers? Again, where there is an offence against municipal law, on the one hand, by the colourable or fraudulent use of simulated documents and a national flag, and an infringement, on the other hand, of the law of nations by crimes committed under the cover of the protection against search which is thus secured; is the latter of these so merged in the former, the international offence in the civil violation, as to give to the courts of the nation whose municipal law has been broken, the exclusive cognizance of the case? These and similar questions grow either directly or indirectly out of the case of the *Virginius*; and when to these is added the moot point as to the nature of the tribunal which is to have jurisdiction to decide on the offence—if offence it be—against public law such as that alleged to have been committed by this vessel, whether such tribunal should be a Prize Court regularly constituted, or an instance Court of Admiralty, or a body of arbitrators summoned *ad hoc*, it will be seen that this case, in whatsoever aspect it is looked at, is one of much embarrassment.

It was allowed, however, on subsequent investigation by the Government of the United States, acting on the

opinion of the Attorney-General, that on the whole evidence surrounding this case, in view of this fact of foreign ownership, and the defect in the bond necessary to give an American nationality, the American character of this vessel was vitiated *ab initio*. The original assertion of Mr. Fish, that at the time of sailing from the United States, in October, 1870, she was "regularly documented and entitled to wear the flag of the United States," was, on subsequent investigation, shewn to be false. We cannot, therefore, but agree with Mr. Curtis in the opinion he expressed on the reply given by the United States Government after they had an opportunity of ascertaining the actual facts and the law applicable to such facts. The reply was,

"That the question of an indignity to the flag of a nation and the capture, in time of peace on the high seas, of a vessel bearing that flag, and having the register and papers of an American ship, is not deemed to be one which is referable to other powers to determine: and that a nation must be the judge and custodian of its own honour."

On this Mr. Curtis observes, that the reply

"Kept up this assertion of the American character of the *Virginus*, when that character was the very point of the question whether our national flag had suffered any indignity, and where our government had the gravest reason to doubt the nationality of the vessel. In such a case we see no solid reason for saying that a nation must be the judge and custodian of its own honour. We regret the answer."

And he proceeds to add that—

"While we can easily conceive of cases in which an affront to this national dignity ought not to be made a subject of arbitration, we do not think that the seizure of the *Virginus* prevented such a case. There was no reason whatever to suppose that any indignity to our flag was intended, and in such a case there could be no derogation from the national dignity in submitting to a suitable arbitrator to try the national character of the vessel."

And Mr. Curtis further states it to be his opinion, that, according to the view he takes of the seizure, had such a course been adopted the arbitrator must have decided not only that the American flag had suffered no indignity, but that the right of Spain to hold the vessel was unquestionable.

This view we shall now shortly examine ; but before doing so we would observe that it is curious, and in view of recent events, not un-instructive, to see how completely all idea of resorting to arbitration as a method of solving international difficulties seems to have been put to one side by the American Government in this embarrassing case. Even if this method of escape from a position which was certainly ambiguous and probably indefensible, was thought objectionable, there seems to have been no obstacle other than a merely technical one, in the way of a regular Court of Prize assuming jurisdiction in the matter: a Court which would sit in the Spanish dominions, and which would doubtless be capable of deciding on any case, however new in its features, of maritime seizure. It, was, indeed objected by the United States Minister that this course could not be adopted because Prize Courts exercise their power only between belligerents, and belligerents and neutrals, in time of war ; and that a state of formal hostilities was not recognized as existing in Cuba where the courts would naturally sit. But to this the answer of Mr. Curtis seems sufficient when he points out that the prize jurisdiction of Courts of Admiralty does not exhaust the whole of their powers, inasmuch as at all times, in peace as well as in war, they are courts of the law of nations, capable of adjudicating on any maritime seizure that may be made, or claims to have been made under any right which that law confers ; and that their jurisdiction over a foreign ship which has been seized for a cause for which the law of nations admits that a seizure may be made, is just as unquestionable in time of peace as it is in time of war.

We proceed, however, now to look at the arguments by which Mr. Curtis, in his very able pamphlet, makes his chief case to rest in favour of the legality of this vessel's arrest, a question which, it will be observed, raises an issue wholly distinct from that involved in the decision ultimately arrived at by the American Government that her national character was vitiated, *ab initio*. His first position—which is, however, introductory to what we may call the staple of his contention

—is the notoriety of the fact that the *Virginus* was, notwithstanding her flag and registration, not American. Mr. Curtis does not in so many words proceed to affirm what her nationality actually was, but states that she was "Enemy's property," that is, it is to be inferred, Cuban, and he observes, (p. 19) in support of this view that if the insurrectionary party in Cuba had been acknowledged belligerents the great judges of modern times, Marshall, Story, and others, "would have stripped off every rag of paper title, and gone straight to the fact that the vessel was in the employment and under the control of the enemy." But although Mr. Curtis terms the distinction a "thin" one, there is a very real and substantial difference between a state of acknowledged war, with the rights incident to and growing out of such a state exclusively and attached to no other, such as e.g. visitation on the high seas, and a condition of relations such as that which obtained between Spain and Cuba, when a Power undertakes to employ this vexatious and harrassing right of search as a means of suppressing an insurrection, or even open revolt in one of its dependencies. But, however this may be, the main argument in the pamphlet before us is, that the *Virginus* having been manned by Cubans, the purposes of her equipment being to aid a Cuban insurrection, and the assumption of the American flag fraudulent in fact, she was, if not a pirate, at least a "piratical aggressor," a vessel, that is to say, outside, to a great extent, the pale of public law, and with regard to which any Government who might feel aggrieved by her proceedings would be justified in disregarding those salutary restraints imposed during a time of peace upon belligerent rights, and in seizing, in exercise of a natural right of self-defence on the open ocean, without even the initial proceeding of a visitation to ascertain the ship's true character, and in absolute disregard of the presumptive nationality arising out of the flag she carried and the papers she had on board. And this natural right of self-defence is incorporated into the law of nations; it is independent of a state of belligerency; it exists at all times in peace as well as in

war, and the only questions that can arise respecting it relate to the modes and places of its exercise.

Now this is a theory which, as applied to cases like that of the *Virginus*, should be received with the greatest caution, as it seems but little in harmony with some of the best settled principles of international law as commonly understood; nor does it derive much countenance from the two cases cited by Mr. Curtis in support of it. For admitting such a principle as that a nation's natural right of self defence to exist—and it undoubtedly does exist—under what conditions would a resort to a principle so elementary and remote be legitimate? Surely not for the mere purpose of suppressing a revolt, or even quelling a successful insurrection; but only where its own national life and existence as a State were menaced, or where an overt act of direct aggression had to be met and defeated. To adopt the language of Mr. Webster, as quoted in this pamphlet (p. 34), the case in which this extreme resorted to should be those only in which "the necessity of that defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation." Within such a description as this, such a state of things as that which arose in connection with the seizure of the *Virginus* can only be brought by an excessive straining both of law and facts. For here there was no direct lending of aid to the Cuban insurgents, inasmuch as there was no attempt on the part of this vessel to effect a landing. Had she done so, the right—the natural right as it may be called—of Spain to resist and repel by force any actual descent, would in that case have been undoubted as a measure of self defence. But previous to that attempt being made, it appears more than questionable whether, under the law of nations, she had this right to take the initiative and act on the offensive in making the capture. And it is hardly a sufficient answer to this, to say that the registration of the *Virginus* had been obtained by fraud, and to assert that she had no right to sail under the United States' flag; for as to the fact of her having been on the American register, there could be no doubt, and there-

fore as against any other nation she was, beyond all question, American. Nor do the cases on which Mr. Curtis relies help much his view of the matter. The first which he cites, that of the *Marianna Flora* (11 Wheaton's Rep. p. 38) is admitted to be one of a violent and unprovoked attack by one vessel, a Portuguese, on another, belonging to the United States navy. The former, until silenced by a broadside from the American vessel, did not hoist her national or any other flag, and it appeared that each took the other for a piratical cruiser. It was held in the Supreme Court that although, as the combat arose out of a mutual mistake, there could be no damages as for a piratical aggression, yet that Lieutenant Stockton, the American commander, was, under all the circumstances of the case, justified in seizing the vessel and in sending her in for adjudication; and no doubt, Mr. Justice Story, in delivering the judgment of the Court, declared that the general law was, "that for gross violation of the Law of Nations the penalty of confiscation may be properly inflicted upon the offending property . . . and a *piratical aggression* by an armed vessel, sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the Law of Nations." This dictum, however, of the distinguished judge who pronounced it, although beyond question sound, and indeed one which commands itself to the common sense of mankind, yet can have no bearing on the case of the *Virginus*, inasmuch as no attack whatever was made by that vessel at sea, nor does it appear that she offered the least resistance to her captors, but, seeing that escape was impossible, threw overboard everything which would serve to indicate a military expedition: and this done, she surrendered, relying on the protection which it was assumed the American flag would afford. The cases, therefore, are by no means on all fours; while, as to endeavouring to fasten on the *Virginus* the character of a "piratical aggressor," all the facts are in the teeth of such a contention, which can only be supported by losing sight of

the ordinary meaning of language, and the admitted facts of the case. For the *Virginus* was guilty of no "tortious attack:" it is not hinted even that there was in her case any "animus furandi," while to suppose that the conduct of a vessel who endeavours to make her escape as fast as possible from her pursuers, and when capture seemed inevitable to divest herself of all military character and offer no resistance to seizure, presents any parallel to "private unauthorised war on land," as Mr. Curtis would contend, seems opposed to all evidence and all analogy. Had she attempted to land her crew, and thus to afford aid and countenance to the Cuban insurrectionists, an offence, and a grave one, would have been committed against public law, which the Spanish Government would have been justified in instantly repelling by force; but even so there is no element common between such an overt act and the offence known as piratical aggression; nor would the principles of the law of nations at issue in the former case be identical with those involved in the decision of the latter.

Mr. Curtis's case, then, in favour of the seizure of this vessel, and his argument derived from the "great right of self-defence, springing from the law of nature," seems to us to rest on a *petitio principii*: the assumption of that which is the main, if not the only, point in controversy, that the ship was not American, and had in fact no national character whatever; or, if she had any, that in virtue of the nationality of the greater part—not the whole—of her crew, she had been "incorporated into the Cuban service," and had thus become "subject to the territorial jurisdiction of Spain." And this assumption runs through the whole of the elaborate attempt (p. 11, et seq.) to justify the proceedings of the Spanish Government from arguments derived from an examination of the doctrine of "territoriality" at sea; the jurisdiction, that is to say, which nations may exercise on the ocean over their own vessels in time of peace. This jurisdiction Mr. Curtis holds—in opposition, he admits, to many respectable authorities—is merely personal, "over the

persons and property of its members wherever they are upon the globe, whether at sea or within the dominion of another nation," and in no correct sense is to be interpreted as making the ship part of the territory of the State to which she belongs. And the conclusion he draws from this view of the doctrine is, that "such jurisdiction can rightfully attach only to vessels that are truly national; and, therefore, that in such a case as that of the *Virginus*, the United States could assert no jurisdiction, excepting upon the assumption that she was an American vessel, which assumption was contrary to the fact." Admitting, however, that the principle of territoriality is, to a certain extent, a fiction of law, and to be used, according to a well-known rule, only for the purposes for which that fiction may be legitimately employed, still it is no less true that this doctrine of national jurisdiction involves much more than the exercise of personal authority over subjects cruising at sea; for the larger extension of the term so as to make it inclusive so far as may be of the vessel herself, the *res* seems necessary in order to secure for her the enjoyment of the great right of navigating the ocean unimpeded, as well as of ensuring adequate protection for the persons and property of those on board. And in the case before us it is to be observed there was and could be no question whatever raised as to the right of the United States Government to assert their jurisdiction over the *corpus* of this vessel in order to ascertain whether their own municipal law was violated or not, and whether the flag she carried, and the papers she used were conclusive on the point of nationality. A question, which as Mr. Curtis himself allows, lies at the root of the whole discussion, which it was necessary to decide before any argument springing from the doctrine of national jurisdiction would apply; for it is admitted that this jurisdiction would rightfully attach only to vessels which were "truly national;" and whether the *Virginus* was truly American or not was the point at issue, and one which the law officers and courts of the United States alone could determine, and in fact did determine, as a matter of construction of their municipal law.

There are other points arising out of this interesting essay, which we regret we have not space to notice. But although, as will be seen, we have taken a different view from that advocated by Mr. Curtis, we cannot but thank him for his valuable contribution in aid of a right conception of the points at issue in this case, and for the ability and learning which he has brought to bear in the investigation of the question of international law which are involved in its discussion, and upon which it must be admitted, in view of the conflict of authorities on the subject, it would be somewhat premature to advance any other than a qualified opinion.

III.—HISTORICAL SKETCH OF THE LAW OF PIRACY.

(Concluded.)

By A. T. WHATLEY, B.A.

PIRACY under the law of nations is justiciable everywhere, and persons guilty of acts, which come under the definition of piracy by the law of nations, may be apprehended by any one. Ortolan* points out the error of supposing that any one who has arrested pirates can put them to death without the intervention of public authority. Such a custom may indeed have prevailed in barbarous times† when the indignation inspired by the atrocities committed by pirates, and the terror consequent on their power and frequent impunity, led men to adopt the severest modes of suppression ;

Diplomatie de la mer I. 211.

† Even as late as the beginning of the 18th century, there was an English law, authorising those who took pirates, *flagrante delicto*, to hang them from the main-mast.

but latterly, when pirates had become less terrible, and civilisation had taught that every man should be held to be innocent till he was proved to be guilty—then it was certainly illegal to put suspected pirates to death without due trial and condemnation.* It is only in the matter of arrest that the strict rule of law is relaxed in the case of piracy: from the nature of the circumstances under which such arrests generally occur, it is obviously impossible for them always to be conducted by the officers of justice, and therefore it is permitted to private individuals to arrest pirates at their own discretion, and without any forms; not, be it observed, on account of the enormity of the offence, but because of the peculiar circumstances under which it is generally committed† The Admiralty Courts—or Courts which correspond to Admiralty Courts—in the various states have a concurrent jurisdiction over the high seas for the repression and punishment of acts that come under the definition of piracy by the law of nations.‡ Piracy created by special convention between Nations, or by the municipal law of one nation, is justiciable only by the courts of the nation or nations so creating it, and only with reference to the subjects of such nation or nations. Thus by treaty between England and Brazil it is piracy for the subjects of either to carry on the Slave Trade; but only the Courts of England and Brazil can

* No one is justified in killing pirates except in combat: for the proper tribunal of the country to which they are brought must decide whether the facts proved against them amount to piracy or not: Wildman I. 208. Molloy, however, holds the barbarous opinion, "captors of pirates need not bring them into port," and it is still more strange to find Sir Travers Twiss holding the same opinion "the crime of piracy being an offence under the Law of Nations, may be punished even on the high seas by the first comer." [Law of Nations in Times of Peace, S. 159.] The "first comer" would probably be too deeply interested a party to form an impartial opinion as to the reality of the supposed piracy.

† Ortolan I. 213.

‡ "The King of England hath not only an Empire and Sovereignty over the British Seas, but also an undoubted jurisdiction and power in concurrence with other princes and states, for the punishment of all pirates at sea in the most remote part of the world. . . . So that if any person whatever. . . with whom we are at amity. . . shall be robbed or spoiled in any seas either on this or the other side of the line, it is piracy within the cognizance of this Court."—The Judge of the High Court Admiralty, 1696.

take cognizance of the violation of the treaty, and only Brazilian and English subjects are capable of so violating it; as it is, by its nature, limited to them. Similarly, it is piracy by the English law for seamen to lay violent hands on a commander, but of course only English Courts could punish such an offence, and that only in the persons of English seamen, or aliens serving on an English ship.* A vessel belonging to a State, and acknowledging its jurisdiction is as much within that jurisdiction as any part of the States' territory.† So Lord Stowell said, "the jurisdiction of the Admiralty of England . . . extends over all criminal acts done by the King's subjects upon the sea in every part of the globe."‡ Ships of war and privateers exceeding their commissions, are not thereby guilty of piracy by the law of nations, and consequently are only responsible to the prince who gave the commission. Bynkershock thinks that a pirate may be tried and punished by the nation whose subjects he has plundered; yet when there is a commission, the prince who gave that commission should be applied to. And this is probably what Molloy means when he says,|| "Foreigners in amity with England plundered by English pirates, can obtain justice under 28 Henry VIII. c. 15." "English Pirate" is a phrase quite inconsistent with our view that absence of nationality is a main characteristic of piracy under the Law of Nations, he should have said an "English privateer."

The punishment of piracy has generally been the most severe that could be inflicted. Cicero tells us§ that Pompey, in his raid on the Cilician pirates, put to death all who had not surrendered themselves voluntarily, and the execution of the captain and crew of a pirate ship taken by a lieutenant of

* Aliens serving on an English ship gain all the advantages which its flag conveys, and must, therefore, submit to the corresponding liabilities. The converse case also holds good, *i.e.* "adhering to the King's enemies by cruising in their ships can be tried as piracy." I. East. P.C. 798.

† Wildman, II. 202. Thus a man of war in the port of a foreign country is exempt from the laws of that country, being considered a piece of the territory of the State to which it belongs. See 17 and 18 Victoria c. 104.

‡ Charge to grand jury, 1802.

|| Page 56.

§ De lege Manilia XII.

Verres is alluded to as a matter of course.* The French ordonnance of 1584 condemned pirates to the torture of the wheel; that of 1718 punished them with death and confiscation of goods, sending their accessories to the galleys for life. But with the decrease of piracy and the increase of civilization in modern times, the punishment has in most countries become less severe; it was death under the English law, till 7 Will. IV., and 1 Vict. c. 38, which (amending certain previous Acts of the same effect) substituted penal servitude for life, or for any period not less than five years, at the discretion of the judge, but, by the same Act, any person who in committing a piracy, attempts murder or unlawful wounding, is still liable to suffer death.

Forfeiture of goods and vessels has almost always been part of the punishment, and it seems that if any one were to seize a piratical ship, it could not be recovered, "*in odium piratarum præter alias poenas statutum est ut eorum navigia cuivis deripere liceat.*"† By the American law the ship is forfeited, but not the cargo—except in extreme cases, and, where the owner of the cargo joins in the piratical acts.

As ships of war are considered part of the territory of the country to which they belong, they are, as a general rule, exempt from search, wherever they may be. But as the law against piracy would otherwise be so many dead letters (for pirates would gain immunity by assuming the character of ships of war) a ship that professes to be a ship of war may be required to lie to, on reasonable suspicion of piracy, and according to the opinion of most writers, no liability is thereby incurred by the challenger, provided all proceedings cease the moment the mistake (if there be a mistake) be discovered.‡

The Supreme Court of the United States have decided|| that "ships of war acting under the authority of government

* In Verrem II. 1, 5.

† Zouch. de jure nautica I. X. 40 O.

‡ Woolsey, s. 190, 195.

|| Case of the "*Flora*," 11, Wheaton 48.

may approach any vessels descried at sea for the purpose of ascertaining their real character." As the United States have always been foremost in opposing any concession as to right of search, any steps which they allow to be justifiable may fairly be taken as the minimum of what may be lawfully done under such circumstances. From the numerous official documents which passed between England and the United States relative to the means to be adopted for suppressing the Slave Trade, the following rules are drawn by M. Ortolan* :—

1. In case of real piracy clearly proved, it is not only a *right* but a *duty* to board the pirate, to search and capture him by force, whatever flag he may hoist.
2. In case of good presumption of piracy, the right of visit to ascertain the real character is allowed, but it must be exercised with great caution and circumspection, as in case of error an innocent ship has a claim for satisfaction.
3. Beyond such "legitimate suspicion" no right approaching that of visit is allowed.

The right of approach to find out nationality (or *droit d'enquête de pavillon en pleine mer*) can of course always be exercised.

The Roman jurists, in their keen analysis of rights, arrived at the conclusion that pirates gain neither ownership nor legal possession of the goods which they seize, only physical detention.† It has since become a fixed principle of International Law, that, generally, goods retaken from pirates are to be restored to their lawful owners, when they can be found.‡ Certain modifications of this rule have been intro-

* Ortolan—*diplomatie de la Mer*, §I. xii.

† *Et quæ piratæ nobis eripuerunt, non opus habent postliminio, quia jus gentium illis non concedit ut jus dominii mutari possint.*" Digest. de capt et. Postl. revers. The same principle was applied to the case of people taken by pirates: "a piratis capti liberi permanent." Digest. xlix., xv. 19.

‡ Grotius 11, xvii. 9, and iii., ix. 16 He tells a story about a town which some pirates took from the Athenians, and Phillip from the pirates; thereupon the Athenians demanded of Philip—not that he should *give* them the town—but that he should *restore* it.

duced by the municipal law of various countries, *e.g.*, a percentage in money on the value of the ship and cargo is generally awarded to the re-captors in lieu of salvage: by the ordonnance of Louis XIV. it was one third; by the 13 14 Vict. c. 26, it is fixed at one eighth of the value. The same ordonnance of Louis XIV. fixed a year and a day, as the time within which the owners must assert their claim, otherwise the goods would go the crown; just as in England, the goods of pirates which have not been taken from any one, and the goods whose proper owners cannot be found, are droits of admiralty. Only in three countries—Holland, Venice, Spain—has the municipal law differed materially from this general principle by giving the property to the recaptors: Venice and Holland unconditionally; Spain,* if it had been in the possession of the pirates for more than 24 hours. These three countries—whose commerce probably suffered more from piracy than that of any others—alleged public utility, and the great difficulty of recapture, as the reasons for adopting so unusual a course. Valin† raises the question: if a citizen of a State whose law gives the goods entirely to the recaptor, were to take from pirates goods belonging to a citizen of a State whose law restores them to the owner, what would be done with the goods? He himself thinks the recaptor ought to have them: but the opinion of Pothier‡ seems more equitable; that (in the absence of any special convention between the countries concerned) the goods should be restored to the owner, *minus* the usual sum in lieu of salvage; for the law of the recaptors country has no jurisdiction over the goods of a foreigner. On the same principle, goods belonging to the subject of a country whose law gives such property to the recaptors, ought not, when taken from the pirates, to be restored to the owners, even if the law of the recaptors own country directs such restora-

* Martin's Essay on Privateers, ch. 8.

† Comm: Sur l'ord, de la marine, III, 9. 8, 10.

‡ Traite de proprie^{té}. 101

tion.* A difficulty arose in 1823 in the case of the *Helen*,† which had been plundered by a piratical brig: on the brig being captured by H.M.S. *Spey*, a great quantity of money found on board of it was claimed by the owners of the *Helen*: the claim was rejected, on the ground that, even if it could be established that the money proceeded from their goods, it was doubtful whether, in strictness of law, the owners of the *Helen* could claim it. On appeal Lord Stowell affirmed the sentence, but admitted that the parties had equitable right to the money, and recommended an application to the Crown. On application being accordingly made, the Lords of the Treasury paid the proceeds to the owners of the *Helen*, minus law expenses. With the above mentioned exceptions, municipal law has only given greater efficacy to the realization of the principle that "goods retaken from pirates should be restored to the owners,‡" a principle which has been acknowledged in almost every treaty of commerce both in ancient and modern times!

Privateering is a relic of the early times when State navies were not fully developed or permanently established, and when the chief means Governments had of carrying on naval warfare was to hire, or seize merchant vessels and equip them temporarily as men-of-war.¶ When State navies were established, privateers, still continued to be used as an auxiliary means of carrying on war: it was obviously most convenient for a State with large commerce and small State navy, to be able, on a sudden emergency, to arm and commission her merchantmen, thus employing the sailors whose ordinary occupation the war had interrupted, and so protect herself from aggression; but the evils of the system are equally patent, and writers of all classes have in all times

* Wheatons El. of Int. Law., 439.

† Hazzard Admiralty Cases, 1. 142.

‡ Ortolan (dip. de la mer, I. 224, note) mentions 16 treaties, to which 15 countries were parties, between 1558 to 1861, containing a provision to this effect.

¶ Merchantmen in those days were generally more or less armed.

urged its abolition.* "The great objections to it are, that the hope of plunder and not patriotism is generally the motive of those who engage in it ; that very little control is exercised over such vessels either by the government which gives the commission, or by the officers, who are often inexperienced or untrustworthy ; that at the end of the war a vast amount of wild characters are thrown upon the country, who are unable to settle down to any of the occupations of peace, and who therefore, not unfrequently, become pirates.

Privateers, with commissions from their own country, fighting only against such enemies of their own country as are limited in those commissions, have never been considered to violate general international law ; nor, till quite lately, have they been prohibited by particular conventions. But as to neutrals who take commissions from neutral powers, there has been discussion, and it will be better to treat the several phases of the question separately, noticing which of them constitutes piracy by the law of nations, and which constitutes piracy by special convention or municipal law.

A. *A privateer with one valid commission* is not a pirate by the law of nations, for the essential characteristic of a pirate is that he has no real commission ; and so, there being no government that can be held answerable for his acts,† he must be made to answer for them *propria personâ*.

B. *A privateer with valid commission exceeding that commission, e. g., by depredating on other nations than those against which it is commissioned*, is not a pirate by the law of nations, so long as it does not utterly abandon its national character.‡

C. *A neutral holding a commission from a belligerent.*—Various States have at various times prohibited their subjects from taking part in contests with reference to which those

* Wheaton, iv., 2, s. 10 ; Kent., i., 97.

† Kent, i., 199. So Bynkershoek : ' Sed pirata quis sit necne inde pendet, an mandatum prædanti habuerit, si habuerit et arquetur id excessisse non continuseum habuerine pro piratâ."

‡ *Questiones Juris Publici*, i., xvii. Sir J. Jenkins, however, in 1675, enunciated a contrary opinion.

States have been neutral.* And many treaties have been made between two or more countries, declaring it piracy for the subjects of one country to take letters of marque from the enemies of the other.† Of course, in such cases, only the subjects of the high contracting parties are liable to the punishment, which punishment only the high contracting parties themselves can inflict. There are writers who approve this form of privateering in some cases, *e.g.*, Vattel, ‡ “Ceux la seuls sont excusables, qui assistent de cette manière une nation dont la cause est indubitablement juste, qui n’a pris les armes que pour se garantir de l’oppression : si l’amour de la justice, plutôt que celui du gain les excitoit à des genereux efforts a exposer aux hasards de la guerre leur vie ou leur fortune,” but this is merely the sentiment of a French theorist ; when we find an actual instance of such noble minded privateers risking their lives and fortunes, without hope of gain, on behalf of an oppressed nation, we shall be ready to relax in their favour either international or municipal law—whichever their chivalry may have led them to violate.

D. *A privateer armed with two or more commissions.*—That this is a pirate by the law of nations (being equivalent to a ship without any commission) is unquestionable in the case

* James I. declared that any ship, having more English than foreign sailors, committing violence against an ally, should be treated as a pirate. By the ordonnance of Louis XIV. French subjects taking commissions from foreign princes, without their sovereign’s permission, were to be treated as pirates.—Sweden, though in 1715 she offered commissions to foreigners, yet in 1784, when she was herself a neutral, forbade such interference on the part of others. The wild proclamation of the French Directory, in 1798, that all neutral sailors in the British Fleet would be considered pirates, was without precedent, and is not likely to be made a precedent by others.

† Treaties between England and United Provinces 1667, Nimeguen Ryswick Utrecht.—Between 1794 and 1816 the United States of America made treaties to this effect with England, Netherlands, Peru, Bolivia, Prussia, Spain, Sweden, and France. The latter may serve as a specimen, “aucun sujet du Roi tres chretien ne prendra commission de lettres de marque pour armer quelque vaisseau ou vaisseaux, a l’effet d’agir comme corsaire, contre les dits etats unis etc . . . et si quelqu’un de l’une ou de l’autre nation prenoit de pareilles commissions ou lettres de marque il sera puni comme pirate.”

‡ Vattel, droit des gens iii., xv., s. 829.

where a ship takes commissions from two or more States which are at war with one another; but when a ship takes commissions from two or more allied States, it is not, according to some writers, piracy by the law of nations. But the better opinion seems to be that it is such piracy, for, as Wheaton observes,* “the co-belligerents may have adopted different rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party.” As the case of a commission from two or more allied States is the most uncertain of all the cases, it will be better to look into it more closely: it is capable of some modifications.

I. Where the ship holding the commission from two or more allied States does not belong to either of those States; here it would seem to be a pirate by the law of nations, and would almost certainly infringe some special convention.

II. Where the ship belongs to one of the Allied States, its commissions are limited to operations against States which are hostile to both the allied States, and it does not exceed its commission. This would not be a pirate by the law of nations, but might be so by the infringement of special convention or municipal law.

III. Where the ship belongs to one of the allied States, but its commissions are not against only those who are enemies of both the allied States, or even enemies of one of the allied States, in either of these cases it would be a pirate by the law of nations, as well as, probably, a pirate by special convention.

E. A vessel fighting under a flag other than that of the State whose commission it has, is a pirate by the law of nations, for it has *ipso facto* renounced its nationality.†

F. Ships with pretended commissions from authorities which are not really independent political communities or Sovereign States, are pirates by the law of nations. Two instances of this may be cited.

* Wheaton's Elements of Int. Law, ii., 11. 15.* † Pothier Œuvres, ix., 140.

I. James II., after his abdication, commissioned ships to operate against England; it was decided at the time that they were pirates, on the following grounds:—*

1. It is possession, and the power of making peace and war on behalf of a nation, that gives a ruler an international position, which is therefore accorded to *de facto* rulers, such as Cromwell; influence in the Councils of Nations depend on power; James was then only a titular prince.†

2. James had no jurisdiction to adjudicate prizes, and to prevent general robbery.

3. Englishmen could not take commissions from any one to attack their fellow subjects. This reason only tends to make the offence piracy by municipal law.

The chief point urged in support of the validity of the commissions was, that those who fought for James in Ireland had been treated as lawful enemies and not as traitors.‡ The colourable authority of James should perhaps have been sufficient to excuse them from the extreme penalty of piracy; yet some of them appear to have been executed, probably on political rather than legal grounds.

II. In 1820, commissions from Avry, "Brigadier of the Mexican Republic,"—a Republic that was not only unrecognised, but even unknown—were not held to authorise capture at sea, or exempt the holders of them from conviction as pirates.||

The evil of privateering has been restrained by the modern custom of requiring a judicial sentence § for every

* Phillimore, i., 398.

† Hallam: "An abdicated or dethroned Monarch may preserve his title by the courtesy of other States, but cannot rank with Sovereigns in the Tribunals where public law is administered."—History of England, i., 219.

‡ See State Trials, xii., 1269 (1693). On this occasion, one of the Lords of the Privy Council defined piracy as "the seizing of ships and goods by no commission, or, what was all one, by a void and null one;" if we add "on the high seas," this make a very fair definition of the offence.—Phillimore, i., 408.

|| Curtis, American Reports, iv., 598.

§ Until the captor is invested by sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration.—Kent, i., 109.

maritime capture. The feeling against it has increased, and many individual States have restricted the power of their subjects to aid foreign belligerents*; but there was no general prohibition till 1854 when the Austrian, Spanish, Hawaiian, Danish, and Swedish Governments declared jointly, that if any of their subjects accepted commissions as privateers they should be treated as pirates, not only by their own country, but by foreigners; they also refused to admit privateers into their ports. Shortly afterwards, the powers which took part in the Treaty of Paris, 1856, united in a declaration, "Privateering is and remains abolished;" but the parties to this declaration reserved to themselves (at the instance of the Russian minister) the right of using privateers in case of war with States, which, like the United States of America, had not acceded to the declaration.†

The greater humanity of modern times has led to this: that neutrals who join belligerents in naval operations against a country with which their own country is at war, are generally held to be pirates. When, in 1850, Lopez collected a band of adventurers in the United States (which was then at peace with Spain) and with them attacked Cuba (a dependency of Spain), a discussion arose in the English House of Lords, in the course of which Lord Brougham said, emphatically, "the law is clear—those men are pirates." In the next year the attack on Cuba was repeated, and fifty adventurers, "without God, without law, and without flag," were shot as pirates.

* *E.g.*, 59 Geo. III., c. 69: "Persons fitting out armed vessels to aid foreign powers without His Majesty's leave, or assisting or being concerned in such fitting out with intent that it shall be used against people with whom H. M. is not at war, shall be deemed guilty of a misdemeanour, and on conviction be punished by fine and imprisonment, and the vessel be forfeited."

† The United States refused to accede, on the ground that privateers were their only means of defence against the larger navies of Europe; offering, however, to accede, if private property of all sorts should be excepted from seizure in war (except contraband of war). "If this exception should become incorporated in the law of nations, her attitude will be one of great advantage to the world; if not, her plea of self-defence will probably be regarded in another age as more selfish than wise,"—says Mr. Woolsey, himself an American. (*International Law*, 176).

By the Statute of Treasons (25 Ed. III. c. 2) piracy was made a felony, before that it had been felony in any alien, treason in a subject.* But, Lord Coke says,† a pardon of felonies would not pardon piracy, which was not a felony whereof the common law took any knowledge, but was only punishable by the civil law, and attainder by the civil law wrought no forfeiture of lands or corruption of blood.

Since many pirates escaped because trial was before the admiral or his lieutenant, after the civil law, which required confession or very clear proof before the punishment of death could be inflicted, and since the crime of piracy was difficult to prove clearly, because the eye-witness, if not accomplices, were generally murdered, therefore it was enacted by 28 Hen. VIII. c. 15, "that all treason, felonies, robberies, murder, and confederacies hereafter to be committed in or upon the sea, or in any haven, river, creek, or place where the Admiral or Admiralty have, or pretend to have, power, authority, or jurisdiction, shall be enquired, tried, heard, determined, judged in such shire and place in the realm as shall be limited by the King's commission, to be directed for the same in like form and condition as if any such offences had been committed or done in or upon the land, and such commission shall be had under the king's general seal, directed to the Admiral and certain Commissioners, to hear and determine such offences after the common course of the laws of the realm used for treason, &c., committed upon the land." The Commissioners, or four of them, were to have power to enquire of such offences by the oath of twelve good and lawful inhabitants of the shire, every indictment found and presented before them for such offences committed on the sea was to be effectual, and those convicted were to suffer such pains of death and forfeiture of lands, and goods and chattels as if they had been convicted of similar offences

* Absence of nationality was not then considered a necessary characteristic of piracy, and piracy was extended to acts which it would not now, in strictness, be held to include.

† Coke iii., Inst. 112.

upon land. This was not to apply to any persons who of necessity took victuals, rope, anchors, &c., from a ship that could conveniently spare them, provided payment was made. There was to be no benefit of clergy* or privilege of sanctuary. Even this Act, says Lord Coke,† did not alter the offence, but left it, as it was, a felony only by the civil law.

By 16 Car. II. c. 6, it was enacted that if the master of a vessel of more than 200 tons and 16 guns, yielded to a pirate without resistance, he was incapacitated from again taking charge of an English ship, and any ship of less burthen was not to yield to a Turkish pirate of less‡ than double her number of guns, without fighting; if any mariners refused to fight when ordered, they were to lose all wages due, and suffer imprisonment for not more than six months.‡

This Act was passed because certain Turkish pirates were then in the habit of giving back part of the cargo if no resistance was made.

By 11 & 12 Will. III. c. 7 (made perpetual by 6 Geo. I. c. 9) it was declared piracy for an English subject to commit acts of hostility against other English subjects, under colour of commission from any foreign power; and for a commander or seaman to betray his trust, or yield up anything to pirates. This was passed, it would seem, for the purpose of repressing the ships commissioned by James as privateers against England.

The numbers of pirates being much increased, 8 Geo. I., c. 24 (an Act for the more effectual suppression of piracy) declared that,

1. Commanders of ships and others trading with pirates and furnishing them with stores should be adjudged guilty of piracy.

* Benefit of clergy consisted originally in the privilege of clerks in orders who when prosecuted in the temporal court, could claim to be discharged thence and handed over to the Court Christian, in order to make "canonical purgation." From clerks the privilege was extended to all who could read, and so were capable of becoming clerks, and to peers. It only applied in capital felonies, and in the case of laymen, commoners, only to the first offence. It was abolished by 7 and 8 Geo. IV., c. 28. See Stephen's Blackstone, iv., p. 583.

† Coke iii., Inst. 112.

‡ See Abbott on Shipping.

2. The forcible boarding of any vessel (though without seizing or conveying her off) and destroying or throwing any of the goods overboard, should be considered piracy.

3. Ships fitted out to trade with pirates, should be forfeited half to the Crown, half to the discoverer.

4. There should be no benefit of clergy.

5. Sailors maimed by pirates should have a reward,* and be admitted to Greenwich Hospital.

6. Master and seamen, not doing their best to protect ships against pirates, should forfeit their wages and suffer six months' imprisonment.

7. To prevent desertion (and so piracy) no master was to pay in advance a sum exceeding half the wages due, on penalty of double the sum so advanced.

This Act, which was at first for 7 years, was made perpetual by 2 Geo. II. c. 28.

Any natural born subject or denizen who, in time of war, shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate under 18 Geo. II. c. 30.

Under 28 Henry VIII. c. 15, there was great difficulty in convicting persons who had committed piracy in the East, or West Indies, as they had to be sent to England: so by 11 & 12 Geo. III. c. 7, it was enacted that piracies might be tried and adjudged at sea, or in any part of the Colonies, by commission under the Great Seal or seal of Admiralty; also, that if any of his Majesty's subjects should commit any robbery or act of hostility against other his Majesty's subjects on the sea, under colour of commission from any foreign Prince or State, he should be taken as pirate, and suffer "such pains of death and loss of lands, goods, and chattels as pirates ought to suffer." The following persons were also declared to be pirates, viz.: commanders or mariners who betray their trust—who piratically and feloniously run away with the ship or boat—corrupt, or lay violent hands on

* Cf. 22 Car. II. 11.

officers, or mariners* who had pirates, are accessory to, or conceal them. If a ship was defended against pirates and some of the crew slain a sum, of not more than 2 per cent. on the value of the ship, was to be awarded by impartial persons and distributed among the survivors and widows and children of the slain. Persons who discovered a plot to run away with a ship were to be rewarded—at the rate of £10 for a ship of 100 tons, and £15 for a large vessel.

The above Act was made perpetual by Geo. IV. c. 49. an Act for encouraging the capture or obstruction of piratical vessels or ships, which further enacted that :

1. £20 should be paid for each pirate taken or killed, and £5 for each pirate not taken or killed, who was on board a piratical ship at time of attack.

2. Ships and goods belonging to British subjects retaken from pirates should be restored to their owners on payment of one-eighth as salvage money.

7 Will. IV. and 1 Vict. c. 28, Acts to amend certain Acts relating to the crime of Piracy, declared that :—

1. Any one who attempts murder while committing piracy shall suffer death as a felon.

2. Persons convicted of offences, which by previous Acts are piracy and punishable with death, are to be transported for life, or for any term not less than 15 years,† or to be imprisoned for any term not exceeding three years, at the discretion of the magistrate.

3. Principals in the second degree and accessories before the fact are to be punishable in the same manner as principals in the first degree. Accessories after the fact are to suffer imprisonment for any term not exceeding two years.

* In *Rex v. May*, mariners who, not agreeing with the Captain, seized him, put him ashore, and carried away the ships were adjudged pirates and executed. —Petersdorf. Abridgement of cases xiii. 349.

† The punishment of death for piracy is not hereby *abolished*: the Act only empowers the magistrate to punish with death or transportation, or imprisonment at his discretion, in cases where piracy is not accompanied with murder. As lately as 1864, five foreigners were executed at the Old Bailey for murder and piracy.

Under 8 Vict. c. 2, Justices of Assize may try offences committed on the high seas; the venue to be the same as if the offences had been committed in the country in which they are tried; material facts must be averred to prove the offence to have been on "the high seas."

The 13 & 14 Vict., c. 26 (1850), is an Act to repeal an Act of 6 Geo. IV. "for encouraging the capture and destruction of piratical ships," and to make other provisions in lieu thereof; but not so as to affect the payment of bounty under the said Act.

1. If any of Her Majesty's ships attack persons alleged to be pirates, the High Court of Admiralty in England, and the Courts of Vice-Admiralty in other Her Majesty's dominions are to take cognizance of such cases, and adjudge the persons and vessels.

2. Lists and returns of such cases are to be sent to the Lords Commissioners of the Admiralty, with a view to their making fitting rewards: this applies to the East India Company's ships and vessels.

It is a curious fact that the ever memorable ship money was imposed for the purpose of defraying the expenses of putting down pirates: as is declared in the first writ for that tax to the Mayor, &c., of London: "because we are given to understand that certain thieves, pirates, and robbers of the sea, as well junks, enemies of the Christian name, or others being gathered together wickedly taking by force and spoiling the ships and goods of our subjects, and of the subjects of our friends on the Sea . . . we command that ye provide "[here six ships with tonnage and crews are specified]" for the safeguard of the sea and defence of you and yours." *

If a piracy be committed by only one of the crew of a ship, the whole ship's company are presumed to have assented to it, unless they can shew evidence to the contrary. "If a pirate assault a ship and kill a man, all

* Cobbett. *State Trials*, iii., 923.

on board the pirate are principals to the murder."* All who do not leave a piratical ship when opportunity offers, must certainly be held guilty; but a man who was ill, and staid below all the time he was on board, was let off in a case when the rest of the crew were executed.†

As to risk when a contract is made to carry goods safely with the limitation "excepting accidents that arise by the act of God and the Queen's enemies." This exception does not include loss by attack of pirates.‡ The expression, "perils of the sea," however, has been held to include such losses, and also loss by mutiny of the crew.¶ Deviation from the direct route when made to avoid pirates does not invalidate the insurance. A lender on bottomry runs the risk of loss by piracy, as one of the "dangers of the sea."§

As to proceedings for piracy at the present day, the indictment must charge the offence to be feloniously and piratically committed, and lay every material fact within the jurisdiction of the Admiralty. The evidence must prove the act, or acts, to have been committed within the jurisdiction of the Admiralty; that there was *animus furandi*; and that violence was exercised, or at least that the goods were delivered up under the influence of fear.¶

By the Constitution of the United States, Congress can** "define and punish piracies and felonies committed on the high seas, and offences against the law of nations." In accordance with this power, Congress proceeded to define piracy by the Act of April 30, 1790 :

"If any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State,†† murder or robbery or any other offences which, if committed within the body of a country, would, by the laws of the United States, be punishable with death; or if a captain or mariner of any ship or

* State Trials, xiv., 1067. † Jacob's Law Dictionary, Sub. v., pirate.

‡ Maud and Pollock, Merchant Shipping, p. 144.

¶ Pickering v. Barclay: 2 Roll. rep. 248.

§ Park on Insurance. p. 112.

¶ Cf. Russell's Crimes and Misdemeanours.

** U. S. Constitution, I., viii., 9. ¶† I. e., one of the United States.

vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of 50 dollars, or yield up such ship or vessel voluntarily to any pirate, . . . Every such offender shall be deemed taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death."

Accessories before the fact to be liable to like punishment. It was subsequently ruled* that this Act did not entitle the Courts of the United States to punish as piracies acts of robbery committed by persons not citizens of the United States on board ships belonging exclusively to subjects of foreign States (they being under the jurisdiction of their own State and the United States having nothing to do with acts committed against the particular sovereignty of a foreign power), but that the Act did apply to robbery committed by a crew acting in defiance of all law and acknowledging obedience to no government or flag: the moment a vessel assumed a piratical character, the crew came under the Act of Congress.† There seems to have arisen some hindrance to the effectual working of this Act, perhaps it was that these were offences which were not punishable with death on land, and therefore not piracy under the Act, which nevertheless, it was felt ought to be punished as piracy when committed on the sea. Accordingly, on March 3, 1819, a temporary Act of Congress was passed, enacting, "if any person on the high seas shall commit the crime of piracy as defined by the law of nations, he shall on conviction suffer death." This was perpetuated by the Act of 1820, which also declared that if any of the crew of a piratical ship should land or commit robbery on shore, he should still be considered a pirate and suffer death under the Admiralty jurisdiction. By the same Act, any person who, within the Admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, should surprise or by open force or violence maliciously attack

* U. S. v. Palmer, 8 Wheaton, 310; cf. Curtis, American Reports, iv., 314.

† United States, v. Holmes, 5 Wheaton, 412.

or set upon any ship belonging in whole or in part, to the United States, or to any citizen or citizens thereof, or to any person whatsoever—with an intent unlawfully to plunder the same ship or vessel, or to despoil any owners thereof—every person so offending should be deemed guilty of felony and punished with fines and imprisonment.

This mitigation in the punishment for acts of piracy preceded a similar change in the English Law * by 17 years. Under the Act of 1846 a captain or officer piratically or feloniously running away with his ship or yielding it up voluntarily to any pirate, is to suffer fine and imprisonment, and by an Act of the next year, subjects of foreign States found cruising against vessels and property of the United States, contrary to the provisions of any treaty,† may be tried, convicted and punished as others charged with piracy.

During the American civil war, the question inevitably arose, whether Confederate privateersmen were to be considered pirates by the American law? Whether their commissions were recognized or not, most undoubtedly they were pirates, because :—

I. If their commissions were not recognized (as the Government of the Federal States had not recognized them, and it was impossible for the Federal Courts to do so), they were pirates by the law of 1820. inasmuch as they had committed the crime of robbery upon the high seas, on a vessel belonging to citizens of the United States.

II. If, on the other hand, their commissions were recognized, they were pirates under the law of 1790, which declared that “any citizen who shall commit an act of piracy or robbery, against the United States or citizens thereof, under commission, from a foreign State, shall be deemed a pirate, and on conviction suffer death.‡

In neither case were they pirates under the law of nations. “If a number of persons, large or small, associate together and undertake to establish a new Government, and assume

* 7 Will. IV. and 1 Vict. C. 88, See above.

† For piracy by municipal law, and special international convention. See above.

‡ See Bernard's *British Neutrality*, p. 119.

the character of a nation, and as such to issue military commissions, any other nation may, according to its view of policy or duty, either utterly refuse to acknowledge the existence of such assumed Government, and treat all who, acting under it, commit aggressions upon the ocean as mere pirates; or each nation may fully recognize such new Government; or it may adopt any intermediate course between these two extremities," as Great Britain did in relation to the Confederates, not treating them as pirates, but leaving the Federals to deal with them according to their sense of justice and policy: "against this her position we have nothing to urge under the law of nations, or treaty stipulation." *

The most philosophical treatment of the crime of piracy and apportionment of punishments is to be found in the French law, of April 10th, 1825. The law in its original form is in paragraphs, with the punishments put together at the end of all, but it may be thus arranged more symmetrically in this manner:—

The following are to be treated as pirates and held liable to the annexed punishments:—

I. Every individual forming part of

(a) The crew of an armed ship which sails without lawful commission and proper papers:

Punishment.—Captain and officers, hard labour for life; sailors, hard labour for a time.

(b) The crew of a French ship which commits depredations on ships of France, or of powers with which France is not at war:

Punishment.—If without wounding or murder, death for the captain; if with wounding and murder, death for all.

(c) French crew which carries off ships with violence to commander:

* Sprague. Admiralty decisions, ii., 286 (charge to grand jury at Boston, Oct., 1861):—It is quite possible, as Phillimore observes (i., 892.), that when part of a country is in rebellion, its acts against its own country may not be piracy, while its acts against citizens of other countries may be piracy.

Punishment.—Officers, death; sailors, hard labour for life. If accompanied by murder, death for all.

(d) French crew which hands over ship to enemy or pirates :

Punishment.—Death for all.

II. Captain and Officers of ship which commits acts of hostility and depredation under other flag than that of power from which their commission is held :—

Punishment.—Hard labour for life.

III. Commander who carries commissions from two or more different States.

Punishment.—Hard labour for life.

IV. (a) Every Frenchman who takes commission from a strange power without permission from the king :

Punishment.—Incarceration (*reclusion*).

(b) Every Frenchman who, having obtained such commission with permission from the king, commits acts of hostility against French ships :

Punishment.—Death.

The ordonnance of Louis XIV. had defined pirates simply as “Sea rovers who have no commission from any sovereign Princes.”

We have now traced the law of piracy from the earliest times to the present day, when there is very little occasion for such a law. For although the offence still lurks in the seas of China, among the Islands of the Malay Archipelago, and in other of the outskirts of the world ; yet the time has long passed away when it was not unusual for a whole crew to be executed for having “committed many and great piracies in most parts of the known world without distinction, upon all nations, and persons of all religions.”* Such piracy as is still to be found, is chiefly piracy by special convention, or by municipal law. But the historical interest attaching to the study of the subject is great ; for the decrease of piracy has been correlative to the increase of civilization, the springing up of international amity, and the development of maritime resources.

* State Trials, xiv., 1970.

IV.—THE PUBLIC PROSECUTOR SYSTEM IN GERMANY.

(Continued from the April Number, page 358)

BY EDWARD ZIMMERMANN, LL.D.

THE important subject of criminal procedure by a system so complicated as that of the public prosecutor cannot be fully detailed in the columns of this review, and we therefore wish our readers may distinctly bear in mind that in the present article, only the leading principles of the German law and practice will be touched.

Germany is very far from a uniform code of criminal procedure. There are very different systems in the different States, and even in the same State. In Prussia, for example, there are at least three different systems. In Rhenish Prussia, the Napoleonic codes have been adopted for more than half a century. In Prussia proper, *i.e.* the old provinces, a system analagous to the French form of criminal procedure was introduced, in 1849, while a third system has, since the year 1867, been put in force by Royal ordinance in the provinces of Nassau, Kurhessen, and Hanover, newly annexed to Prussia, in lieu of the old system of public prosecution, which was partly based on more liberal principles. In Saxony, the public prosecutors are subject to the control and direction of a public prosecutor general, the present occupier of the position being Dr. Schwarze, well known as an eminent authority on criminal procedure. In Bavaria and the Grand Duchy of Baden, the institution of criminal proceedings by the public prosecutor are regulated by special laws, and different systems exist in other German States. It will be obvious, from this statement, that any attempt to delineate all the different systems would be simply a failure, and we shall therefore content ourselves with a mere general outline of the position of the public prosecutor in the judicial system of Prussia proper.

Anyone, in England, may act as public prosecutor; in Prussia on the contrary, no one but the public prosecutor can institute criminal proceedings. The office was introduced by a law passed in 1849, and there are numerous other ordinances which regulate his position. Courts of Justice are not permitted to entertain any prosecution without his application. At every district court a public prosecutor is appointed who must have obtained the highest legal qualifications, equal to those of a judge of the superior courts. It is his duty to use every effort to discover the author of any crime which has been committed, and to prosecute the offender before the court. Whenever occasion requires the Minister of Justice must give assistance to the public prosecutor, over whom he exercises a direct control, and directs his officers and assistants. At every Court of Appeal a public prosecutor, with a superintending authority, attends. The superintending public prosecutor, the public prosecutors and their assistants do not belong to the class of judicial functionaries, and in the exercise of their official duties they are not subject to the supervision of the courts. Public prosecutors are only subject to their superintendent, and he with them to the Minister of Police. Public prosecutors are appointed by the King, on the recommendation of the Minister of Justice. They must watch that in all criminal proceedings the laws are observed, so that not only the guilty should be punished, but also that the innocent should not be convicted, nor even prosecuted. Should the public prosecutor decline to prosecute, an appeal can be made to his superintendent.

In minor offences, police or other petty officers prosecute. All prosecuting officers and their staff of clerks receive fixed salaries, and are not permitted to accept fees. They personally conduct the cases before the courts, and combine the work both of solicitor and counsel.

A short exposition of the criminal procedure in Prussia may best explain the immense importance of the office of public prosecutor.

There is no trial by jury for political offences or for those

committed through the press, but there is a special court for the trial of political offenders without juries. In principle, no government officer is amenable to the courts for any alleged wrong done in the exercise of his office. The Grand Jury is unknown, and there is no preliminary enquiry in this respect similar to the English system.

The appointment of the public prosecutor being made by the King, on the recommendation of the minister of justice, who appoints the assistants, without the concurrence of the judges, to the government alone the assistants look for a definitive appointment and advancement, not only in this particular sphere, but also for promotion to the Bench. No such appointment is *dum se bene gesserit*; an officer in such a position must do something more; he must give satisfaction. He is liable to be removed to another quarter if he does not give satisfaction to the government, and may look in vain for an improved salary, for honour, or distinction. Can such an arrangement be considered a really sound basis for the administration of criminal law, or a fair solution of the question in what hands the most sacred rights of life and honour should be placed? Is there any human being who, questioned whether he would commit the slightest interest in his personal welfare to the hands of an officer so situated, would answer in the affirmative?

But now let us look to his office. His primary duty is to have the perpetrator of a crime discovered, and to prosecute him before the courts, but, as we have said before, also to protect the innocent from unjust prosecution. Surely this is too solemn a task to be entrusted to one, who is absolutely dependent upon his superiors. But this is not all the impediment to a fair fulfilment of his duties. The assistants, nominated by the minister of justice, under the direction of the public prosecutor, are not at liberty to use their own judgment and discretion in forming an opinion of a criminal act, as to the propriety of either prosecuting a person, or treating him as innocent. The public prosecutor himself is likewise subject to the supervision of a superintending officer,

and both must follow the instructions of the minister of justice. Thus the virtues, the inclinations, and even the weakness of the minister will pervade the prosecutions. There cannot be independence, for (not to mention other possible influences) if the colleagues of the minister had any complaint to bring forward, he of course would direct the public prosecutor accordingly. The position of the public prosecutor as regards the bench and the public is this. He is not subject to the supervision of the courts. Being an independent administrative officer, co-ordinate with the Court, the judge knows well that he acts upon the instruction of the minister of justice, and so long as judges are subject to human frailties, their position will be seriously injured as fair administrators of the law, when they are subservient to the minister's recommendation for their increased remuneration, promotion, or honourable distinction. If the judge is dissatisfied with the proceedings or behaviour of the public prosecutor, he has no power over him, but can only complain to the supervising officer, and finally to the minister of justice. The bench in England would certainly not tolerate such a position. Whatever the letter of the law may say, a public prosecutor, backed by the minister of justice, must obtain an influence and authority to which the judges ultimately will look more or less as a matter of course. Lastly, as regards the public: Prosecutions being only instituted through the public prosecutor, a private individual has no other remedy against the criminal than an application to the public prosecutor, and, on his refusal, to appeal to the superintendent, while if he supports his subordinate, the private party *having no appeal* to the Courts of Justice, there is an end of the matter. There is no proper protection against an over zealous, nor against the prosecutor *cunctator*.

If, on the one hand, we find a special provision that the public prosecutor is not under the supervision of the Court of Justice, we are not, on the other, prepared to say that the Bench is not under the control of the public prosecutor. We are by no means sure that the Minister of Justice does

not sometimes consider the public prosecutor a fair channel for obtaining information, enabling him to judge of the qualifications and capacity of a member of the Bench. This system cannot work satisfactorily. In some cases, the public prosecutor has been compelled by his superior to act against his own opinion, in others the parties injured have been prevented from preferring an indictment, and that may lead to an absolute denial of justice, especially in Press prosecutions.

The invention of the system is attributable to Napoleon the First, who, beyond instituting a Draconic penal code, established the *ministère public*, by creating officers under the absolute direction of the minister of State, who control all branches of public administration, the department of justice not excluded, to such an extent that personal reports of the behaviour of the judges in the exercise of their judicial functions were made, in order to ascertain whether they "worked" properly. It was only a consequence of such a system that Courts of Justice were unable to judge on any questions of public administration, and that an administrative court was established, to whom the *ministère public* had to apply for a decision on such matters, on the ground that the matter in question did not appertain to a Court of Justice. Thus an administrative Court sat in judgment on the jurisdiction of a Court of Law. This monstrosity has been also imitated in Prussian legislation. At times we may submit to something clearly wrong in principle, because in practice we find it does not work badly. If, however, we apply that test to the public institutions of France, that is to say, if we examine the result of a most severe penal code, enforced by proceedings under the regime of the *ministère public* in its complete development, and if we consider that it has existed in that country for nearly seventy years, and then find that it is wrong in principle and bad in its practical results, we shall surely hesitate in following such an example.

A thorough reform of the Prussian law with reference to the imprisonment of the accused, the search for and seizure of objects connected with the crime, is at this time very

generally demanded. The law provides that the public prosecutor is not to imprison or arrest except in cases of immediate danger, or of the criminal being discovered in *flagranti*, without the assistance of a court of justice or of the police. During the preliminary enquiry, as well as during the further prosecution or remand, the court can order the arrest or confinement of the accused. A provisional arrest may be made without an order of the court, but the person so arrested must be forthwith produced before the public prosecutor, who has authority to at once discharge the person arrested. If the public prosecutor does not discharge the accused he must immediately apply for an order for the arrest or confinement of the criminal. The court cannot, of course, arrive at a judgment without an examination of the facts, for an "imprisonment" always supposes the probable existence of a crime, although the state of facts may not be fully ascertained. The judge has to consider, with "dutiful" care, whether the suspicion raised against a person is sufficient to proceed in the arrest. Particular regard is to be had as to the greatness of the crime, and the probability of the person suspected escaping from any further enquiry. The public prosecutor, therefore, if it has not been already done, must prefer an act of accusation, in applying for the judicial confirmation of the arrest. If no accusation is preferred, the court, from the omission of this form, must order the discharge of the prisoner. The law for the protection of personal liberty, especially regulating the proceedings on imprisonment, provides that the prisoner, at his first examination (such examination of the accused forming the essential part of the judicial enquiry, contrary to the English principle), is at once to be made acquainted with the nature of the accusation. The police are authorised to proceed with a preliminary arrest of the accused, subject to certain regulations, but they have to transmit all the proceedings and papers to the public prosecutor. The police may not detain the prisoner beyond the next day after his arrest, but must produce him to the public prosecutor, or if the circum-

stances justify, it is sufficient merely to produce the papers to the public prosecutor, and it is not absolutely necessary then to produce the prisoner before him. If the latter course is adopted the prisoner must be informed, for if he insists upon being brought personally before the public prosecutor, it cannot be denied him. It has been held that a court of justice cannot decide upon a question of arrest, and discharge a prisoner until the court has become cognisant of the matter upon an application on the part of the public prosecutor. Up to that time the prisoner is absolutely at the disposal of the public prosecutor. This is the view, or rather the direction expressed in an ordinance of the minister of justice, of the 7th December, 1850. This illustration will evince the evils of the system.

We have seen that the public prosecutor represents an administrative body, irresponsible to any court of law, and absolutely subject to the direction of the Minister of Justice, who himself holds no judicial character, but up to the present time is an irresponsible minister, solely dependent upon the approval of the Sovereign. Although the law of the 12th February, 1850, most clearly directs that the continuance of imprisonment must be decided by a Court of Justice, yet the only medium for obtaining this decision is the public prosecutor. If we are right in assuming that even public prosecutors are not infallible, and if it is considered that the sacred right of personal liberty is entrusted to these irresponsible officers, we naturally ask what legal safeguard has been established by law, to ensure the faithful administration of such a trust? The law directs the Courts of Justice to decide upon the question of personal liberty, but how can the court grant its legal protection, if the prisoner has no right to invoke the action of the court? From another point of view this state of things assumes a serious aspect. In German criminal procedure it is considered an important right of the accused that he should be heard as early as possible on the accusation made against him, and although he is not bound to answer, yet that he should have an immediate opportunity of entering

on the matter, and of explaining the circumstances. He may, if he pleases, at once mention the evidence which will exculpate him, so that his innocence may be ascertained in the very first stage of the inquiry. On the last principle the law provides that, if the accused is in prison, he must be examined on the matter, for as if at liberty he would have the opportunity of explaining the case, so, being in prison, he should be examined to give him the chance of making such an explanation. The consequence of the ministerial theory, that the court is not to judge of the continuance of imprisonment unless it is seized of the case by the public prosecutor, will be, that the accused may not give a statement which would clear himself.

Another incident to criminal prosecutions is, the search for objects connected with a crime. Houses may be searched by the police only where delay would frustrate the administration of justice, or the securing any evidence would be imperiled by waiting until an application could be made to a court of law or the public prosecutor, who makes such orders as he thinks necessary.

Where seizures are made by the police on their own responsibility immediate information must be given to the public prosecutor for him to decide on their necessity or continuance. A singular case which has recently occurred, will show how unsatisfactorily this regulation works. A legal professional man was engaged with the proper parties in drawing up certain proceedings, when, without any previous information or enquiry, a police officer with the proper posse comitatus, entered the private residence of the lawyer, declaring he had authority to seize the papers, and that if they were not given up at once, he was directed to proceed by force to search the house. The papers being of an innocent character were, of course, at once given up. Examination of the parties connected with the matter took place, and after a lapse of several weeks the lawyer was served with an unceremonious summons to attend the Criminal Court to receive back his papers. It does not

seem to have occurred to the authorities that they should have had the ordinary sense of politeness to return the papers. No excuse, no explanation was offered, and no notice was taken of the very serious injury inflicted on the parties by such an interruption of an ordinary legal transaction. The only explanation, which was verbally given, was that information had been received of an encroachment on the *sovereign* power of the State, by the issue of a *summons* to attend, whereas a mere invitation had been issued to parties interested to attend a certain specified place. Nothing of this kind could possibly have happened under the direction of a court of justice.

In practice and in theory the defects of the law in the points referred to have been amply discussed, and generally admitted. The deficiencies of the Prussian system of criminal procedure have been carefully investigated and fearlessly exposed by Professor von Holtzendorff and others.

An opportunity offered itself to the Prussian Government, at the termination of the victorious war of 1866, to avail itself of the labours of peace and science. Parts of Germany were then united to Prussia, including the Kingdom of Hanover, the Electorate of Hesse, and the Duchy of Nassau. By the Royal ordinance of the 29th of June, 1867, the laws regulating criminal procedure, hitherto in force in these parts, were abolished. The laws then in force in Prussia proper were not substituted, but a new code was introduced. The hope of something substantially better was not fulfilled, for the new code also adopts the system of public prosecution of which an outline has been given. While the old Prussian laws introduced the public prosecutor, the ordinance for the new provinces avoids as much as possible the strict personal appellation of public prosecutor by adopting a general designation of the office itself. It is of course difficult to give an appropriate term in the language of a country which does not even know the system itself, but perhaps it may be rendered most intelligible by the designation of the "public

prosecution office." We shall hereafter endeavour to explain the object and bearing of this alteration in terminology.

We now proceed to summarise the leading principles of the ordinance of 1867. It provides, in the first place, that the prosecution, of any crime, misdemeanour, or offence, before any court of justice shall be carried on *ex officio* by the public prosecution office, which by virtue of its office is bound to discover the guilty person, and to procure his lawful punishment. The prosecution office introduces the bill of complaint or indictment, either directly to the court of competent jurisdiction in such matters, or by applying for a preliminary enquiry. After the prosecution office has presented the bill of complaint or indictment, it is no more at liberty solely to decide on the further proceedings; it is, on the contrary, the duty of the court to clear up the state of things by all legal means without being bound by the terms of the application of the prosecution office; and, according to the result of the investigation, to form a conclusion. The object of the investigation and the decision is the act committed by the accused, not only regarded in the view under which the prosecution office is following it up, but in the real bearing as ascertained in the course of the investigation; it may even happen that facts are to be considered which by the public prosecution office have been differently connected, or perhaps not insisted upon at all. Cases where the act proves to be an infraction of another law of a more serious character are not excluded. All public authorities engaged in criminal proceedings have, within their respective provinces, to take with equal care into consideration the circumstances which may tell for or against the accused. It is the duty of the public prosecution office to elucidate the state of facts, to ascertain what evidence there is to charge the author of the deed, and to take all proceedings necessary for the preparation of the bill of complaint or indictment. For these purposes enquiries of any sort may be made, with the only exception of the examination of witnesses upon oath; and enquiries may be continued by the office even after the complaint or indictment has been presented to the Court; and in

preliminary procedure the office may, if there be danger in delay, make searches or seizures.

The business of the public prosecution office is transacted by—

1. At the highest tribunal by the public prosecutor general and his subordinates.

2. At the Court of Appeal by the superintending public prosecutor and his substitutes.

3. At the Courts of Justice of the first instance by the public prosecutor and his substitutes.

4. At the Police Courts, by the prosecutors for matters of police.

The business of the prosecutors at police courts may, with power of revocation, be entrusted by the minister of police to an official of the prosecution office attached to a court of the first instance; or to a judicial functionary attached to a police court, besides the police magistrate; or to an officer attending the court for his legal education. If the minister of justice has not made such provision, then the prosecutor at the police court is to be nominated by a commission from the Government officer of the political district, after the superintending public prosecutor has been heard. The chiefs of municipal corporations (mayors) not on the bench of the police court, are bound to undertake the duties of a prosecutor in the court on receiving a remuneration to be paid by the communities, or parishes forming the district of the jurisdiction of the police court. The remuneration is fixed by the government. All functionaries of the public prosecution office have to comply with the directions given them by their superiors.

The exercise of control is committed: to the minister of justice over the functionaries of the prosecution office; to the superintending public prosecutor over the functionaries of the prosecution office within the district of the court of appeal; to the public prosecutor, over all functionaries of the office within the district of the courts of justice of the first instance. If

in the course of the sittings of a court, or in matters which do not admit of delay, the functionary of the office should be prevented from acting, the presiding judge may appoint a judge to act as substitute. The office is independent of the courts, and has to see that all legal provisions be observed. The court is bound to make an order or decide upon any application, with reference to the enquiry, made by the office. When objections are taken against the functionary of the prosecution, the superior of his office has to decide upon such objection. When the prosecution office does not consider an information made by a private person a fit case for prosecution, the reasons for such a determination must be given to the applicant. The informant may complain to the superior officer, but no further appeal is admissible. Where the public prosecutor has declined to proceed, a private individual may proceed in the following cases for himself—

1. Where the criminal procedure can only be commenced on the complaint of the injured party.
2. Where besides any other punishment the judge may order, the accused to make compensation.

The right, therefore, of prosecution by a private individual on the refusal of the office is still, therefore, very limited. He must also employ an attorney, authorised by proper power of attorney.* The private prosecutor has to give security for the court fees and the costs of the accused, unless he is admitted to sue in *forma pauperis*. The security is given either in cash or by valuable paper. The public prosecutor is at liberty to appear at any stage of the proceedings. There is no doubt that the impediments thrown in the way of private prosecutions will in many cases have the effect of a denial of justice. It is difficult to find any fair reason why the approach to the court of justice should be barred. In cases of personal affront or assault, it is only fair to state, a private individual may proceed at once without application to the office.

* There is no difference between attorney and counsel.

After having obtained a general penal code for all Germany, the necessity of the reform of criminal proceedings, especially in public prosecutions, and in the introduction of a uniform procedure, has been universally admitted, and the Germans are hard at work to effect this. A draft code of German criminal procedure, has already been published by the Government. It is, however, in several respects incomplete, especially, as the constitution of the courts has not been decided upon, and as the question of the mode of trial has been left open. The draft code proposes several important amendments. Arrest is distinguished from preliminary confinement, and the leading principle is that arrest is to be by order of a court. The person arrested is to be examined or heard by the judge on the subject of the accusation, within one day of his reception at the gaol. The judge, conducting the preliminary enquiry, may direct the arrest of the accused, but cannot discharge him without the consent of the public prosecutor. Why, we ask, is this restriction of the powers of the judge?

The public prosecutor as well as the police may in cases of danger from delay, secure the person of the offender, if legal cause of arrest exists. The accused must be brought before the judge at the latest on the following day. If the local judge is of opinion the arrest is unjustifiable, he orders the prisoner's discharge, if otherwise he orders his detention; and if, within three days of the transmission of the proceedings, the public prosecutor does not prefer an indictment, the judge is to order the charge to be withdrawn.

The code distinguishes the mere custody from the formal seizure of things for the purposes of criminal procedure. Search may be made at the house of the offender either for the arrest of the accused or for the means of discovering evidence. Searches with certain modifications and in the night time can only be made in the house of a third party, if there is reason to suppose that the person or thing sought for is in the rooms to be searched. These searches are to be ordered by the judge, but where danger may arise from delay

they may be made by the public prosecutor or the police. In cases of danger the same persons may, under certain circumstances, seize letters, telegrams, or other things delivered by the post office, but such letters and things must be delivered unopened without delay to the judge, who decides as to opening the same, and he must within three days confirm the seizure.

The writer now asks leave to conclude these very fragmentary expositions and remarks, with a few observations regarding the English criminal practice. There is no doubt that although legally any person in England may act as public prosecutor, still the want of an official whose duty it would be to prosecute is most seriously felt; a fact very apt to provoke serious discussion, if we bear in mind that any public body or community, or parish, is perfectly at liberty to appoint a professional man to act as a public prosecutor. There can be no doubt that the authorities would be willing to make such appointments, if there were no other but simply legal impediments. Whether the public prosecutor system of some of the German States could be looked upon as the panacea to be applied to the administration of justice in England, is another question. So far as the writer, from a sixteen years' study and practice of the English law in England, is enabled and entitled to express an opinion, he does not feel the slightest hesitation in asserting that the introduction of such a system of prosecution would be utterly repugnant to the British character, that it is the very contradiction of the organisation of English procedure, that it would be an insult to the Bench to create an administrative body entrusted with the monopoly of prosecutions, and at the same time, in respect of their office, exempted from the control of the courts of justice. In short, there is no room within the English system for this Napoleonic invention.

In view of the great expense and inconvenience connected with English criminal proceedings, we think that the Courts of Quarter Sessions should appoint standing counsel with

fixed salaries (no fees whatever), that the magistrate or judge should be empowered to order any evidence to be produced which he may think requisite at any stage of the proceedings, utterly independent of the prosecution or the defence, that the division of labour between attorney and counsel should no longer be permitted, and that obsolete forms and technicalities should be done away with. A new penal code would then be indispensable, and an energetic Lord Chancellor will do the rest.

V.—THE HISTORY OF THE WORD "LAW."

Concluded.

II.

WE have now to investigate the causes of the ambiguity of the word *law* preparatory to examining into the reasons why the distinctions between its meanings have not been clearly pointed out by English writers. Two causes have combined to give *law* its double meaning.

It is well known that the majority of our Anglo-Saxon or Germanic ancestors came from that part of Germany called Friesland, and that their tongue became the spoken language of the greater part of England. The words for "law" in Frisian are *æ* or *ewa* and *riucht*, which answer to the old Anglo-Saxon *æ* or *æwe* and *riht*. In Anglo-Saxon *æ* soon ceased to be used in the sense of "law," but retained the special meaning of marriage (like German *ehe*)* rather longer, until it became lost altogether. *Riht*, the other word for "law," also seems to have fallen into disuse at an early period and to have been preserved only in a few compounds, such as *folcriht*, *landriht*, &c. It always retained its meaning of *right* or *faculty*, which is indeed derived directly from it. The Anglo-Saxon words for "statute" were *dōm*†

* Cf. Latin *conjugium*, English *wed* (from Gothic *withan*), Dutch *wet* (law), all, like *æ*, with the sense of *binding*.

† Cf. Sanskrit *dhar*—to lay down. Fick: Indogerm. Wörterbuch, 99.

and *âsetmiss*. Dôm also means judgment and is therefore analogous to the Greek *θέμις*, (from *τιθημι* to lay down) and the Frisian *here** (from *kiasa* to lay down). *Asetniss* is derived from the Anglo-Saxon *âsettan* to place.

In the 9th, 10th, and 11th centuries, England was invaded at intervals by the Danes, who permanently settled in the north east part of the country, and as part of the population had considerable influence on the English language. The old Scandnavian word *lag*, from causes to be mentioned presently, had the double meaning of "law" and "statute,"† and this word was brought over by the Danes into England. Whether they obtained such a position in the kingdom under the protection of Canute as to have any considerable influence on the legal language is matter for conjecture, but it is certain that soon after they had permanently settled in England the word *lag* under the form of *lagu* took the place of *æ* and *riht*,‡ at first in those words which were especially in use in the Dahish part of the country, as appears from such terms as *lahslit* (violation of law) which was peculiar to the Danes||. *lahmann*, a judge, &c., and finally *lagu* became the only word for "law," *æ* and *riht* disappearing entirely except in a few traditional expressions.§

* Grimm: Deutsche Rechtsalterthümer 768 (2nd ed.)

† In modern Danish, *Lov* (— *lap*) has lost the sense of "law," retaining that of "statute." *Ret* (cf. German *Recht*) is the modern Danish equivalent for "law."

‡ The transition stage may be detected in the synonyms *landriht* and *landlagu*, *folcriht* and *folclagu*, &c.

|| Schmid: Geetze der Angelsachsen, Glossary *lahslit*, *Denalagu*.

§ I have been favoured by a Teutonic philologist with the following note on the theory above suggested:—"That the A. S. *lagu* is of Scandinavian origin is made at least probable by two facts, (1) that the word is unknown in the earlier stages of the language, and (2) that it does not occur in any other Teutonic language except the Scandinavian. There are, however, formal difficulties, which have not hitherto been cleared up. The A. S. is a *feminine* substantive, the Norse *lag* is neuter. It is, however, important to observe that the Danish *lov* is derived not from *lag* itself but from the plural *lög*. Now this plural *lög* really stands for an older *lagu* (as in *mög* = A. S. *magu*), and if we assume that this older form was still in use at the time when the Danes invaded England, we see at once that the A. S. *lagu* is simply the Norse plural *lagu* mistaken for a singular." The case of *animalcula*, *animaculæ* is a similar instance of a neuter plural being taken for a feminine singular.

But *lagu* did not lose its double meaning of "law" and "statute," although *dōm* is more commonly used for the latter, and hence *riht* and *lagu* are frequently employed in the Anglo-Saxon Laws as synonymous, but so irregularly that it is not always easy to decide what are their precise meanings.* The modern *law* is of course descended from the Anglo-Saxon *lagu*.†

The second cause of the ambiguity of *law* is to be found in an importation of another class of invaders.

The Normans brought with them among other terms which now form part of our legal language the word *ley*, which from historical causes which will be mentioned presently, had obtained the meaning of "law" (*jus*) in addition to the classical meaning of *lex* ("statute") from which it was derived. From the similarity of sound and spelling the Norman *ley* became confounded with the Saxon *lagu*, and confirmed its original ambiguity.

Law, then, inherited its faults from its parents, but the double meaning of the Scandinavian *lag* and the Norman *ley* is still unaccounted for. To explain this involves the investigation of an obscure subject.

The customs and law of a people are developed as part of its nature or character, this nature itself depending upon other causes which do not directly belong to the province of jurisprudence.‡ Two races of antiquity, the Teutonic (Scandinavian) and the Hellenic, are distinguished by the

* cf. Ethelr. viii. 87. Cnut. ii. 1, and 15, s. 2. *Lagu* is universally translated *lex* not only in the mediæval version of the Anglo-Saxon Laws but even by the modern commentators, except where that rendering would be absolutely insensible. E.g., in the preamble to Ethelred's Laws (*Dōmas*) they are said to be enacted by the King and his witan *after Engle lage*, which Schmid correctly translates "nach englischem Recht." But he translates *lāselit* "legis violatio," although he subsequently states that it was applied to certain cases of "Rechtsverletzung." It is evident that the similarity between *lah* or *lagu* and *lex*, *legis*, caused the error.

† Max Muller; *Über die Resultate der Sprachwissenschaft*, 1872, p. 25.

‡ Ahrens Introduction to Holtzendorff's "Encyclopædie der Rechtswissenschaft," and his "Naturrecht," *passim*.

complexity of their theocratic system and the richness of their mythology, both arising from their tendency to personify the forces of nature.

"The sentiment of curiosity as it then existed was only secondary and derivative, arising out of the strong primary or personal sentiments—fear or hope, antipathy or sympathy, impression of present weakness, unsatisfied appetites and longings, wonder and awe under the presence of the terror-striking phenomena of nature, &c. Under this state of the mind, when problems suggested themselves for solution, the answers afforded by Polytheism gave more satisfaction than could have been afforded by any other hypothesis. Among the infinite multitude of invisible, personal, quasi-human, agents, with different attributes and dispositions, some one could be found to account for every perplexing phenomenon. The question asked was not, What are the antecedent conditions or causes of rain, thunder and earthquakes? but, Who rains and thunders? Who produces earthquakes? The Hesiodic Greek was satisfied when informed that it was Zeus or Poseidon. To be told of physical agencies would have appeared to him not merely unsatisfactory, but absurd, ridiculous and impious."*

When the Greeks had passed that happy stage where people followed the customs of their ancestors because they had been told they were good,† and began to speculate on the origin of these customary rules, they attributed their binding force, not to common consent founded on a conviction of their utility, but to the direct enactment of the gods. Law obtained in this shape is therefore considered as made up of separate rules, each of which has been the subject of an act of legislation. The old words for law in Greek and Scandinavian accordingly express the idea of legislation, i.e., position, and not of something binding in itself, e.g. *δίκη*, = Sanscrit *diça*, precept,‡ *θέμις* from *τίθημι* to lay down, *νόμος*

* Grote's *Plato* I. 2, 3. As to the similar tendency of the Scandinavian nations, see Dr. Dasent's Introduction to his translation of the *Njal Saga* (*Burnt Njal*, 1861) p. xiv., and as to the general tendency of the human mind to attribute striking phenomena to supernatural agencies see Comte's *Philosophie Positive*, I. 9.

† Plato: *Leg.* III. 2., cited by Grote.

‡ Fick: op. cit., p. 93.

from νόμος to assign, *lög*, *lag*, *lagu*, &c., from *legan*, to lay,* *Recht* from Aryan *ragta* = straight, *i.e.*, ruled.†

From this we can understand why the Greeks and Scandinavians had only one word for the two conceptions of laws laid down expressly, and rules which had grown up by custom,‡ and why jurisprudence in the philosophical treatises of the Greeks is mixed up with speculations on subjects which have only a remote connection with it.

Nor is it difficult to understand why the Roman conception of law differs so strikingly from that of the Greeks and Scandinavians. The Romans were a practical, unspeculative people, who worshipped utility rather than philosophy, and preferred a useful body of law to theories concerning the origin of justice. With them, therefore, customs developed into law without the aid of any theory about their divine origin, and their binding force was attributed, not to the express commands of the gods, but to their own utility: "Jus . . . quod omnibus aut pluribus in quâque civitate utile est."|| For the same reason they were the first to develop law as a distinct science apart from all other speculations,§ and brought their system to a state of perfection which still makes it an indispensable part of the study of scientific law.

In the older jurists we find a clear line drawn between *lex*

* Grimm: *Deutsche Mythologie*, 231, 500; *Rechtsalterthümer*, 768; *Rechtshofen*: Fries. Wörterbuch, v. Orloch.

† Fick, 168, 15.

‡ See the note on νόμος in Grote's *Plato*, I., 252, and Hobbes *Leviathan*, ch. 24 (p. 234.) Plato's theory of the origin of law is contained in the *Leges* iii. sec. 3 and 4, where he recognises customs (ἔθνη) as existing before laws (νόμοι), and explains the transition by supposing that several tribes unite voluntarily and codify their customs into positive enactments. This hypothesis, being an invention of Plato's imagination, has no weight in deciding the question how the idea of law arose. The love of the Greeks for systematic laws constructed on theory is shown in the *Politicus*, where Plato places an artificial scheme of government higher than an unsystematic aggregate of customs.—Grote's *Plato*, II., 494.

|| Dig. I., 1, fr. 11.

§ Ahrens—"Naturrecht," s. 6.

and *jus*. *Jus* was anything *binding*,* originally, no doubt, whether as part of morality or law† (whence its use as right or faculty) but in the language of jurisprudence signifying a body of law or a part of that body, even a single rule,‡ while *lex* meant an express provision, either for a single case or a class of cases, whether made by a political legislator or by a private person in an agreement, but in its more technical sense a statute or act passed by the *populus*.||

About 150 B.C. the Greek philosophy appeared at Rome,§ and with it the ideas of justice¶ and law laid down by a divine legislator. Unfortunately the Greek language possessed but one word for *law*, namely, *νόμος*, which the Roman jurists imagined was the exact equivalent of their *lex*, and hence in translating from the Greek they used *lex* to express *νόμος* whether *νόμος* was used in that sense or in the sense of *jus*.** From this source arose the untechnical use of *lex* and *leges* as equivalent to *jus* which caused almost hopeless confusion in the works of the amateur writers on law, such as Cicero,†† and even influenced the professional jurists, especially Ulpian.

* *Jus* is not derived from *jubeo*, *jussum*, as the punning "*Jus id quod jussum est*" of the Romans seems to imply; on the contrary, *jubeo* is derived from *jus*, or rather from its root, the Sanskrit *yu*, to bind (cf. *jugum*, *judez*, &c.): *jubere*, therefore, is to make binding, to command. (Corssen—*Ueber Vocalismus etc der Lateinischen Sprache* I. 366). M. Ortolan, in his admirable "*Instituts*" (I. 549) not only adopts the false etymology but builds on it the assumption that early Roman law was an "*ordre impératif et dur (jussum), formule technique et rigoureuse*." It is remarkable that the equivalents for "*law*" are in many languages connected with "*oath*." In Latin, *jus* is law, *juramentum* is oath; in old German, *ra* is law, *eid* is oath; in Anglo-Saxon, *æ* is the old word for law, *aða* is oath, *æwda* a purgator; and the Frisian *riucht* and the Scandinavian *lag* both signify oath as well as law. This shows that *bond* is the primary idea of the words. † Cf. the use of "*jure*" as meaning rightly or justly.

‡ Digest, XLIV. 7, 1, s. 9. ¶ Inst. I. 2, s. 4. § Ortolan, I. 215.

¶ Compare the definitions of justice in Plato's *Republic* with that given by Ulpian, Dig. I. 1.10.

** Dig. I., 8.2. An exception is to be found in Inst. I., 2, s. 8.

†† Cicero mixes up jurisprudence and philosophy to such a degree that it is difficult to attach a definite meaning to any of his terms. Thus in the *Republic* (III. 22) and the *Leges* (I. 6) he attributes positive law (*jus*) and everything else to the grand principle of nature (*lex*), while in the *Partitiones Oratoriae* (c. 37, ss. 129, &c.) he opposes *lex* in the sense of positive law to nature; in other passages *jus* is used both for human and divine law (*Republ.* VI., s. 28) and *lex* in the technical sense of *populiscum* (*Topica*, V., s. 28).

According to Cicero* there is a "ratio summa insita in naturâ" which he calls *lex*; this *lex* is "naturæ vis," "mens ratioque prudentis," "juris atque injuriæ regula" and it existed before "scripta lex ulla aut omnino civitas constituta," for it was not devised by human ingenuity, nor is it "scitum aliquod populorum," but "æternum quiddam quod universum mundum regeret."†

The meaning of this is that there are certain principles in nature, which have always existed independently of mankind. These principles are not laid down or expressed in any manner, but we infer their existence from the uniformity of their results, because in cases within our control or observation we find that uniformity of result follows from a continuing cause. From the scientific point of view, therefore, a law of nature is merely a convenient mode of expressing a regularity of action, in the same way that a generic name is a convenient mode of dealing with a group of separate individuals,‡ but the expression "law of nature" was not used by Cicero in this manner, i.e., as a means of dealing with results or abstractions as if they were real existences, but to explain the origin of the principles themselves. So that the word *lex* here means the conscious act of the Creator, in other words, the *cause* of the observed phenomena, while in the modern use of the term a law of nature is the *result* or résumé of the phenomena.||

This use of *lex* explains why Cicero speaks of a *lex naturæ*, which is in effect co-extensive with the *jus naturale* of Ulpian,§

* De Legibus I. 6. Repub. III. 22. † De Legg. II. 4.

‡ Helmholtz, Popular Scientific Lectures (Eng. trans.)—"A general conception . . . takes a number of single facts together and stands as their representative in our mind. We call it a general conception, or the conception of a genus, when it embraces a number of existing objects; we call it a law, when it embraces a series of incidents or occurrences." (p. 18).

|| Mill: Logic. I. 353. Herbert Spencer: Essays (3rd Series) 83. For the various senses in which the term "law of nature" is employed, see the Duke of Argyll's *Reign of Law*, ch. ii.

§ Ahrens (*Naturrecht* I. 46) considers the *jus naturale* as the "abstract aggregate of rules laid down by reason, the *lex naturæ*," but Cicero uses his *lex naturæ* to account for the origin of positive law generally, and Ulpian treats *jus naturale* as the cause, not the effect.

for although each separate train of effects may be said to result from its own *lex*, the whole of nature is subject to one supreme *lex* of which the others are but branches. The *jus naturale* is well known to have been adapted from the *jus gentium*, which consisted of those rules of positive law which were found (or thought) to be common to all nations, and it preserved the name *jus* because, according to the proper sense of the expression, the *jus naturale* consisted of rules of human law, although they might be considered as the result of "naturalis ratio."* But, according to Ulpian, who is fond of introducing philosophy into his explanations, the *jus naturale* is "quod natura omnia animalia docuit,"† and he gives instances of the operation of this *jus* in which both animals and men pursue a certain course of conduct from instinct. Ulpian's division of *jus* into *naturale*, *gentium* and *civile* has been defended by Savigny, who considers the meaning to be that animals have relations which serve in the case of men as the *materials* for law,‡ but it seems improbable that Ulpian, whose speculations are generally of a very weak character, should have gone so deeply into the nature of things for his division. The Roman jurists could not help seeing that the *jus gentium* was not identical with the *jus naturale*, because slavery was allowed by the one and not by the other,|| and therefore Ulpian gives all three in his enumeration of the different kinds of *jus*. As for his notion of *jus naturale* being *quod natura omnia animalia docuit*, it is not difficult to conceive that, being obliged to account for the difference between the two, and finding the *naturalis ratio* considered as the source or origin of the *jus naturale* he transferred the term *jus naturale* to what Cicero (with perfect consistency) calls the *lex naturæ*, and thus made the *jus naturale* identical with the *naturalis ratio*, which is its parent.§ This is confirmed by the fact that the Roman jurists some-

* Gaius : Dig. I. 1, 19.

† Dig. I. 1, s. 8.

‡ System I. (Beilage).

|| Dig. XII. 6, 64.

§ For explanations of the Modern Law of Nature see Ahren's "Naturrecht," and Lorimer "Institutes of Law."

time speak of *lex naturæ* instead of *jus naturale* ;* thus Ulpian himself says: "Lex naturæ hæc est ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi lex specialis aliud inducit."†

From all this confusion was developed the theory that the rules of positive law, which are indirectly the result of natural laws, are identical in their nature with these natural laws themselves. This theory is conspicuous in the celebrated work of Montesquieu on "L'Esprit des Loix," and has not quite disappeared from the writings of French philosophers. Montesquieu defines "les loix" as "les rapports nécessaires qui dérivent de la nature des choses," and considers that all animate and inanimate bodies have their "loix." It is true, he admits, that "les êtres particuliers *intelligents* prevent avoir des loix qu'ils ont faites," but "ils en ont aussi qu'ils n'ont pas faites. Avant qu'il y'eut des êtres intelligents ils étaient possibles ; ils avoient donc des rapports possibles, et par conséquent des loix possibles." These observations are perfectly in place in the introduction to a work on legislation, but standing by themselves they have no effect beyond confusing the reader's ideas, instead of assisting him to a comprehension of the differences, not in degree only, but in kind, between the laws of nature, *i.e.*, the formulæ of philosophy and science, and the positive law which is the direct subject matter of jurisprudence.‡

Another theory of some importance has also been developed from a perverted use of *lex* and *leges*. We have seen that *lex* in its proper sense meant an Act passed by the *populus*, but after the *populus* had lost the exercise of its legislative powers the term *lex* was commonly used to denote any enactment, whether by the plebs, the senate, or the Emperor. Again, after the great race of jurists had died out, the statute law and the case-law (*jus a prudentibus compositum*) were commonly distinguished,

* Dig. II. 14, 27, s. 2, XLVIII. 20, 7 pr.

† Dig. I. 5, 24 ; cf. L. 17, 206.

‡ Cf. Block "Dictionnaire de la Politique" v. "Contrat Social," and "Loi."

the former as *leges*, the latter as *jus*.* This was an intelligible distinction, but it disappeared at Rome in consequence of Valentinian's regulation as to citations from the works of certain jurists, the effect of which was to give the force of law (*legis vicem*) to their opinions in certain cases, and hence the jurists were called *conditores legum*, or *legislatores*, and their binding opinions *leges*.† This was the origin of the old fashioned mode of citing the fragments in the *Corpus Juris* as *leges*. Either the habit of thus calling every rule of law a *lex*, or the neglect of all sources of law except the constitutions and cases re-enacted or re-published by Justinian as statutes,‡ deriving their sole force from his legislation, or, as Hugo suggests, the growing materialism of the time, gave rise to a theory which has had a most misleading effect on many questions of jurisprudence, the theory that legislation is the sole source of law. The falsity of this theory is so obvious to any one who has studied the history of law, and has besides been so ably criticised by Hugo,§ Savigny,§ and others, that there is no occasion to discuss it here. The same causes gave rise to the use of *leges*,¶ *lois*, *leggi*, &c., as synonymous with *jus*, *droit*, *diritto*, &c., which is especially common in French and Italian writers; this in its turn caused *lex*, *loi*, *legge*, to obtain the signification of "rule of law" (for which the classical Latin was *jus*, not *lex*),* and even of "law" in the abstract, in place of *jus*, *droit*, *diritto*, &c.

Latin, therefore, has one advantage over English in possessing distinct words for "law" and "statute," namely, *jus* and *lex*, but this advantage is almost counterbalanced by the

* Ortolan I. 420. Savigny: System I. 119.

† Ortolan I 396. 426.

‡ Savigny: System, I. 120. The *jus civile Romanorum* was known among the barbarians as the "Lex Romana."

§ "Die Gesetze sind nicht die einzige Quelle der Rechtswahrheiten." Civil. Magazin, iv., 89.

§ Vom Bernf, c. 2.

¶ "Jurisprudentia est scientia legum."

** *Lex* and *leges* are so used by Bracton, Fortescue, and other early English writers on Law, and it is probably from this source that *law* obtained the meaning, "rule of law."

ambiguity of *jus*, which not only means "law" and "rule of law," but right or faculty. So that an English writer, in translating from Latin, would not only be puzzled by the use of *jus* and *lex* to express conceptions for which his own language has only one word, but he would also find it difficult to know when *jus* meant *law* and when *right*. Accordingly, the most ludicrous mistakes have been made by the older English writers in borrowing from the Roman Law. Thus Hobbes says:—

"The names *lex* and *jus*, that is to say law and right, are often confounded, and yet scarce are there any two words of more contrary signification. For right is that liberty which the law leaveth us, and laws those restraints by which we agree mutually to abridge one another's liberty. Law and right, therefore, are no less different than restraint and liberty, which are contrary, &c."* And, again, in the *Leviathan*†:—"I find the words *lex civilis* and *jus civile*, that is to say, *law* and *right civil* promiscuously used for the same thing, even in the most learned authors, which, nevertheless, ought not to be so. For *right* is liberty . . . but *civil law* is an obligation . . . *lex* and *jus* are as different as *obligation* and *liberty*."‡

The error of Sir Mathew Hale and Blackstone in converting the *jus personarum* and *jus rerum* of the Institutes into *jura personarum* and *rerum*, and then rendering them by the "rights of persons" and the "rights of things," has been sufficiently commented upon by Austin.§ A writer of the Benthamite school, Mr. James Mill, who, although entirely ignorant of law, took upon himself to write the articles "Jurisprudence,"

* "De Corpore Politico." Part II. ch. 10, s. 5.

† Part II., ch. 26 ad fin.

‡ See also "Leviathan, c. XIV., where Hobbes translates *jus naturale*, the "right of nature."

§ The term "Rights of Things" is not such pure nonsense as Austin asserts, for "of" may here mean "in respect of," as it does if we say "Law of Things." It is remarkable that Savigny considers "*jus personarum*" to mean not "law of persons," but "the position of the individual in the legal relations of the family: it denotes not the *jus obiectivum* [law] but the *jus subjektivum* [right]." *System* I. 400. This is in effect almost a reconciliation of Austin and Blackstone, for Savigny thinks that *jus* here means "right," which is what Blackstone says, and he also thinks that the division of the Institutes entitled *Jus personarum* deals with "status," which is what Austin says, but Savigny confines it to the status of members of a family. *

"Law of Nations," &c., in the *Encyclopædia Britannica*, has the impertinence to talk of "that disorderly mass, the Roman Law," which, according to him, "changes the meaning of the word [right], in stating its division of the subject, *jura personarum* and *jura rerum*. In the first of these phrases the word *jura* means a title to enjoy: in the second it must of necessity mean something else, because things cannot enjoy. Lawyers, whose nature it is to trudge one after another in the track which has been made for them, &c., &c." It is a pity that Mr. Mill did not take the trouble to understand the phraseology of the Roman jurists before condemning it.

Again, in translating *law* into Latin, English lawyers always use the word *lex*, even when "law," meaning the body of legal rules, properly answers to *jus*. Hence *lex scripta* and *lex non scripta* are commonly used instead of *jus scriptum* and *non scriptum*, although it would have been less trouble to take the proper expressions from the Institutes. But the phrase, "municipal law," is the most curious instance of the confusion between *jus* and *lex*.

Municipal law, Blackstone tells us, is so called by him "in compliance with common speech, for though strictly that expression denotes the particular customs of one single *municipium* or free town,* yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs."† Even if municipal law originally meant the particular customs of one single *municipium* the extension of the term to a sense diametrically opposed to its original meaning would be sufficiently remarkable. But, as it happens, *lex municipalis* means not the customs or law in force in a particular *municipium*, (which if it had a name would be *jus municipale*) but the charter or constitution incorporating the *municipium* (Dig. XLVII., 12. 3., s. 5.; XLIII. 24. 3. s. 4).‡

* Cf. Bentham: General View of a Complete Code of Laws; s. 1.

† Comm. I. 44.

‡ The origin of the use of *lex loci* to denote local law is more obscure. We cannot have taken it from Ovid:

Quid frustra refugis? cogit hos linea jungi:
Hæc in lege loci commoda Circus habet.

Amor. III. 2. 20.—It may be derived from a passage in the Digest (L. 6. fr. 6 s. 1.) where *lex loci* seems to be equivalent to *lex municipalis*. *Locus* frequently means a *municipium* in Roman law (Dig. XXII. 5. fr. 22.)

III.

We are now in a position to understand the reasons why our authors have not given complete definitions of this unfortunate word *law*. Blackstone analyses his own definition at considerable length, and from one not altogether logical passage we may conclude that he adopts the theory that legislation is the sole source of law:—"Municipal law is a rule of civil conduct prescribed by the supreme power in a State. For legislature [= legislation], as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law that it be made* by the supreme power. Sovereignty and legislation are indeed convertible terms; one cannot subsist without the other."† According to this a State which regulates its internal affairs by custom has no sovereign.

Moreover, Blackstone was no doubt misled by the similarity between *law* and *lex*, and their supposed identity of meaning. This has evidently influenced almost all writers on the subject.‡ Thus Hugo says: "In English *law* and not *right* [in German *Recht*, like *jus*, signifies "law" as well as "right"] is used for an abstract system of legal rules, with the addition of adjectives, which are often inconsistent with the original meaning of *lex*. The 'municipal law' of English authors, meaning the particular system of law in force in a given country, may be excused, but 'common law,' *i. e.*, that part of the law which depends not upon Acts of Parliament, but to a great extent at least, upon custom, as opposed to 'statute law,' is as inappropriate an expression as canon-law."§ The author seems to think that *law* is derived from, and has the same meaning as *lex*, and that "statute law" means a single Act of Parliament, both of which notions are erroneous.

Thirdly—Blackstone seems to have been misled by the opinion current in those days concerning the so-called laws

* Bentham sagaciously observes, in quoting these words, "he might have added, 'or at least supported.'" Fragment on Government: Introduction, n. (a).

† I., 46.

‡ *Supra*, p. 646, n. (*).

§ *Op. cit.*, p. 103.

of nature, for he draws no distinct line between laws of nature, laws of God, and human laws, and merely says that the laws which he proposes to consider are the rules of *human* action or conduct, which he considers part of the rules or principles governing the universe. Yet Blackstone himself points out that the functions of irrational beings in obedience to natural laws "are not left to chance or the will of the creature itself, but are performed in a wondrous *involuntary* manner," which sufficiently distinguishes the "unerring rules" laid down for their guidance from the rules of positive law.

As Austin did not criticise these oversights of his predecessors we may assume that he agreed with their conclusions and was influenced by their arguments. But the circumstance which gave the peculiarly positive tinge to his doctrines was his strong prejudice against the metaphysical and theological school of jurists, especially against the writers on the Law of Nature. "Muddiest sources," "fustian styled the Law of Nature," "needless and futile subtlety," "misleading and pernicious jargon," are the expressions which Austin never fails to use when it is suggested that law can have any other origin than the conscious and specific act of a determinate sovereign. "Specious but hollow treatise" is his epithet for Savigny's immortal essay, "Legislation."* After having read the account of the origin of law given in that work Austin had no excuse for adhering to Hobbes's theory of "commands," contaminated as it is by the false theory of the social compact. Austin himself wonders that Hobbes should have arrived at conclusions similar to his own with the aid of such a "figment."† But it is plain that the positive scheme of Hobbes suited Austin's mind, trained in the codifying school of Bentham, and that his dislike to the theories of other writers prevented him from even understanding their views.‡

Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.

† I. 287 seq., n.

‡ See his remarks on Hooker and Montesquieu.

IV.

The point of resemblance common to all kinds of laws, is the uniformity of action which results or is expected from them. Positive laws (*i.e.*, rules of positive law) differ from all others in these respects: they are of human origin, *i.e.*, they cannot exist without human beings, and they can be enforced politically, *i.e.*, either by a machinery forming part of the constitution of a given society, and capable of being set in motion as a matter of course whenever a rule is violated, or by the fear of political inconveniences, as in the case of International Law and Constitutional Law. Law in its widest technical sense is the abstract aggregate of these rules. Jurisprudence, as a branch of philosophy, is concerned with the *origin* of law, its nature, and its connection with the other phenomena which make up the universe. Jurisprudence as a science investigates the *sources* of law, or the mode in which it obtains (and loses) its binding force, the connection between its departments and individual rules, and the mode in which legislation (*i.e.*, the formal expression of law) its interpretation and practical application can best be effected. Jurisprudence as a science is necessary for the consistent development of law as a practical art; as a branch of philosophy jurisprudence is necessary to discover the true principles of the science.

CHARLES SWEET.

VI.—COUNTY COURT AMENDMENT BILL.

IT was with no little surprise that we, a few days ago, discovered the existence of a County Courts Bill now before the House of Lords. It is entitled, "an Act to amend the Acts relating to the County Courts." It is short, consisting of only ten clauses. However, short as it is, it is intended to have a wide operation.

The first two clauses of the Bill are much needed reforms, and remove serious defects of the present state of the law under the County Court Acts. In liquidated claims for *more than* £5 provision is made for a plaintiff obtaining judgment without attending on the day of hearing to prove his claim (unless the defendant gives to the registrar six clear days' notice, in writing, of his intention to dispute the claim), the plaintiff is to be at liberty in such case to prove the service of the summons by affidavit; or, if it is served by the bailiff, by the certificate of the bailiff. This amendment of the present law will be very acceptable to the attornies, or rather solicitors, as they are to be called, from whose hands the County Courts Acts have hitherto taken the control of the service of process in those Courts. This Bill authorizes a new and therefore, presumably, a more liberal scale of professional costs, irrespective of amount of debt recovered, but is silent as to the Court fees, which we believe to be a much more important matter. We would strongly urge provision being made by the Bill in the case of service by the plaintiff, or his attorney, for a diminution in the court fee. It would be very inequitable that the same fee should be charged where the officer of the Court serves the process as where he does not, and where the plaintiff either takes this trouble himself or pays an attorney for it.

The concluding sentence of clause 2 is open to objection. It provides that any bailiff who gives a false certificate of the service of the summons, "shall be deemed guilty of perjury," that is to say, that a person who has not committed perjury shall be deemed to have committed perjury. We think that the object of the clause would be best answered by providing that a bailiff who so offends *shall be liable to the penalties of perjury*.

Clause 3 provides a very necessary power for County Court judges, viz.: That they shall have the same power over causes within their jurisdiction as superior judges at chambers have over causes within their jurisdiction. We

would suggest that the words, "Her Majesty's Superior Courts" should be changed for the words "Her Majesty's High Court of Justice," seeing that the Judicature Act provides for the Superior Courts becoming divisions of the High Court of Justice. This section, however, provides no form of appeal from such a division of a County Court judge. If it is intended that the present practice of appeal by special case should apply, then we most emphatically say that such a mode will be too cumbrous, expensive, and dilatory, and will put too much power into the hands of the most arbitrary class of judges in the country. The best way of providing an appeal from Chamber decisions of a County Court judge would be by placing their decisions on the footing of Masters of the Superior Courts, and allowing a summons to be taken out at Chambers in town, which could be disposed of within a few days, at a smaller expense than simply drawing a case would involve, and which might be referred to the court, if the judge at Chambers thought fit.

Connected with this subject of appeal, we would remark that we regret to see that it is proposed to repeal sec. 26 of 19 & 20 Vict. c. 108, as this is the only provision which exists, enabling a suitor to appeal from the decision of a County Court judge, without the circuitous method of a special case, and without first giving security for costs. It is possible, under this section, to move the Superior Court, after a trial in a County Court, just as if the trial had occurred at the Assizes. Under secs. 7 & 10, of 30 & 31 Vict. c. 142, the only method of appealing from a County Court judge is by the dilatory and circuitous method of a special case stated by the judge, and with the vexatious condition of security for costs. The foot note to Schedule B of the Bill, stating that under 19 & 20 Vict. c. 108, s. 26, the attornies go on with the pleadings to issue for the sake of costs, is an unfair statement. The last judicial statistics show that only 332 actions were, under that Act, sent for trial in the County Courts. If one reason more than

another induces suitors to resort to the operation of 19 & 20 Vict. c. 108, s. 26, rather than to 30 & 31 Vict. c. 142, s. 7, it is because of the easy form of appeal we have noticed, and also because there are pleadings on both sides, so that each party knows what case he will have to meet. The present Bill affords an excellent opportunity for enacting that it shall be open to any suitor to move a division of the High Court of Justice to set aside or reverse the decision of a County Court judge, and that such Divisional Court shall have power to grant such motion on such terms as may be considered fit as to security for costs, or otherwise. Security for costs could thus always be enforced in case of a vexatious appeal, and a poor suitor would not be deprived of an appeal in a proper case.

We regret to find that by clause 5 of the Bill provision is made for the registrars and high bailiffs receiving fees for their own use; it is true that the subsequent part of the clause provides for these officers being paid by allowances instead of by fees. We thought that the days of paying by fees officers connected with the courts of the land had quite passed away, and that the principle had been condemned as bad, which allowed officers of Courts to have an interest in the amount of business transacted. We cannot see any difference between subordinate officers being remunerated by fees and judges being so remunerated. If a judge can be properly and sufficiently paid by salary, we cannot see why a subordinate may not be so paid. The evil and anomaly of paying a judge by salary and a subordinate officer by fees appeared very clearly under the recent bankruptcy judicature, under which the judge and registrar was paid by salary, and the official assignees and messengers by fees; this resulted in most cases in the official assignees and messengers having larger salaries than the judges of the Court, and in some cases, to the best of our recollection, the remuneration of the official assignees amounted to double the amount of the salary of the judge. If it is intended that such a result should occur, we can say nothing

more than that we consider the principle producing it a very bad one.

There is a threat of another retrograde step by this Bill, and apparently a constructive repeal of a statute passed a few years ago by which it was provided that all persons thereafter appointed registrars should discharge the duties of high bailiffs. This was intended to get rid of a superfluous and very expensive officer, an officer who in almost every case acted by deputy, an officer who performed his duties by giving directions to his subordinates, directions which were in unusual and difficult cases the result of the advice of the registrar, and perhaps of the judge also. The high bailiff was an expensive middle man, and was well got rid of.

This Bill will, by the repeal of Section 2 of the 30th and 31st Vict., c. 142, seriously interfere with wholesale traders, in respect to debts under £5, which must be considerable in number, the average of all business in the County Courts being only some £3., inasmuch as all debts for £5 and under must be recovered under the old system of the plaintiff attending and proving his claim.

VII.—REFORM OF THE ECCLESIASTICAL COURTS.

BY THE REV. DANIEL ACE, D.D.

THE present moment is opportune for a few observations on the administration of the law in Ecclesiastical Courts. For the last forty years, public opinion, more or less enunciated by successive Governments, has clearly denounced the incompetency of these tribunals, and indicated the necessity of their abolition. Consequently, during this interim, the jurisdiction of these courts has been ousted by statutable authority in all suits concerning *Tithes* of a certain amount, *Church rates*, *Defamation*, *Testamentary* and *Divorce* and *Matrimonial* causes, having been deemed by the Legislature as disqualified to entertain further such specified suits for adjudication.

Notwithstanding ecclesiastical jurisdiction has been so rescinded, those Courts still retain power in cases over both clergy and laity; and, as a logical sequence, enlightened public opinion seems to demand their total abolition, or at least a considerable amendment both in the constitution and process of Courts, even denominated spiritual.

By no less an authority than the late Baron Cranworth, those Courts were, in the year 1856, characterized as "cumbersome, dilatory, and expensive;" and as to the judges, nineteen out of twenty were incompetent to discharge their judicial duties. In 1865, the Archbishop of York, in Convocation, observed that the delays, expense, and the cumbersome procedure of the Ecclesiastical Courts which had descended to us from past generations, should be swept away in order that simple justice might be simply done; inasmuch as the present mode of proceeding in those Ecclesiastical Courts led to constant miscarriage of justice.

Such avowed opinions, with others of equal stringency, have induced the House of Lords to entertain the question. In 1872 a Select Committee investigated the matter, and made a report. Thereupon, Earl Shaftesbury introduced a Bill, which passed through all its stages. At an advanced period of the session, it came before the House of Commons, when it was discovered that the Bishops had introduced clauses to extend and render more palpable their coercive power, and judicial authority; and as they had thus, on the best of motives, improved the occasion, the House of Commons, ostensibly on this ground, rejected the Bill, although it was confessed by all parties that no sufficient time remained to ponder over the provisions of a Bill designed to secure the proper administration of justice, and to effect one of the greatest reforms of the age.

In this state of things, is the question under consideration one that admits of indefinite postponement? It is submitted, quite the contrary. The present Lord Chief Justice of the Common Pleas, when, Attorney General, declared in the House of Commons, "that some provision

must be made for a reform of the Courts by which the ecclesiastical business of the country is transacted," and Mr. Gladstone accepted the proposition that there was an urgent case for legislation.

Fiat justitia, ruat cælum!—With grave submission it is contended, that the first duty of any Government is to cheapen, expedite, and simplify the law, and render redress to every injured man. The *vexata quæstio* of Church and State is eschewed;—that may be within the province of politics—it is not of essential jurisprudence. But is it not the common as well as the statute law of this land that the sovereign is over all matters, ecclesiastical as well as civil, supreme? Then why are we not by legal enactment to secure Judges of legal training and learned in law, in these inferior Ecclesiastical Courts? Should these minor Ecclesiastical Courts be allowed to continue, a similar provision to that contained in the Irish Act for Ireland, in 1864, should be enacted for England; and it was provided for in Lord Shaftesbury's Bill, that every Chancellor or Diocesan Judge should be a barrister-at-law, in actual practice of seven years standing, and appointed by the Crown as the fountain of coercive jurisdiction. No valid objection has been adduced in argument to the proposal to remove every case of a contentious character, requiring a legal decision, directly and immediately to the Metropolitan Ecclesiastical Courts; such cases especially as involve questions of clerical conduct, doctrine, or practice; and those appertaining to the interests and rights of the laity. It is also proposed that those Ecclesiastical, Metropolitan Ecclesiastical Judges, should at least be Barristers of fifteen years' standing, in actual practice, eminently qualified to take rank with our Common Law Puisne Judges who, in important cases, as is now similar in Election Petitions, should hold their Courts in the locality where the contest arises; and, by their character, experience, and learning, confer authority, gravity, and value on their decisions.

One specimen of recent adjudication in a minor Diocesan

Court, by a clerical judge, may sufficiently illustrate the point mooted. Incidentally it has been mentioned in the House of Lords. An opulent vicar in the South is a chancellor in the North. When a certain important case came before him, he ventured to set aside the dicta of such legal luminaries as the late Lord Stowell, and Dr. Lushington, Dr. Phillimore, Mr. Justice Blackburn, and the Lord Chief Justice of the Court of Queen's Bench, pronouncing such distinguished judges as being only "co-ordinate" authorities; and the inference to be deduced from his legal exposition was that those eminent judges had never reached the apex of contemplation of this reverend Chancellor. Of course, on appeal to the Provincial Metropolitan Court, after six months' delay, his judgment, by his superior judge, was at once reversed; showing thereby that the law as it is, and not what is considered an improvement of it, must rule courts of justice. When nearly a year had elapsed, after the commencement of the suit, the case was remitted to the Court below, and the delinquents at once confessed their offence, as it was futile to struggle against facts. But what follows? This clerical judge, for five months, postponed judgment, and at length revealed his purpose of delay. Justice required him, on confession of the guilt of the defendants, to admonish them, and assign to the plaintiff his full costs. The judge declared his unwillingness to do so, as he intimated that he disagreed with the higher court; but on the law of the case he was bound to submit. He then avowed he was in a difficulty, but he would allow the defendants to withdraw their plea of guilt, the object being to drive the plaintiff into a compromise. This, with dignified firmness, he disdained. A responsive allegation was then filed, and before the plaintiff had an opportunity of examining it, a second plea of guilt was recorded, to enable the judge, by this process, to assign a nominal sum of twenty shillings to the plaintiff. And all this with a view, as confessed by the clerical judge, to effect the extraordinary purpose, as in this sample detailed. *Ex uno discite omnia.*

As to the alleged objection of salary for the metropolitan judges, that may be easily removed by union, as at present, of the office of the judge of the Admiralty, or any judge of the High Court of Justice, or the Mastership of the Faculties, with that of the Dean of Arches, being a barrister of ten years' standing, and a similar judge of the High Court of Justice may be appointed to act as Metropolitan Chancellor of York. At present fees, amounting to £72,000, are paid annually to ecclesiastical officials, the services of many of whom might safely be dispensed with, due regard being paid to their vested interests. The late Lord Westbury, in 1871, implored the House of Peers to pass the Bill for Reform of the Ecclesiastical Courts, as thereby £40,200 would annually be saved to the nation—a consummation devoutly to be desired.

It is a lamentable fact that by means of reversionary interest, children have been appointed to the office of Registrar in ecclesiastical courts, by prelates of a past age; in fact ladies have held such offices, one of them at the tender age of five years. Now, bishops' secretaries are usually the favoured occupants of the office of registrar. Recent legislation, in an Act styled Ecclesiastical Dilapidations, has assigned fees both to Registrars and Secretaries of bishops; so that in some cases (and worse still) from the ill-paid, and so called inferior clergy, double additional fees may be claimed and exacted by the gentlemen in whom those two offices may be united. Surely, it is high time to apply the pruning-hook to these ramifications. It is now clearly apparent why the Irish Ecclesiastical Courts and Procedure Act, of 1864, has not, by legislative authority, been substantially adopted and applied to the Realm.

In 1856, Lord Chancellor Cranworth remarked, on this subject, in the House of Lords, "I feel bound to say that I have received very little encouragement from the bench of Right Reverend Prelates." Lord Cranworth's Bill was a Government measure—lost by a majority of eight. On that occasion the late Archbishop of Canterbury and fifteen other

English Prelates were assembled. It is not a little remarkable that the whole English bench of Bishops voted unanimously against the Bill, whilst, to their honour be it proclaimed, the Irish Prelates voted in its favour. No scheme of Ecclesiastical reform can be complete and satisfactory to the nation, unless it contains provisions to render Archbishops and Bishops themselves, amenable to ecclesiastical discipline and jurisprudence, as well as their inferior clergy.

Now the procedure at present in the Ecclesiastical Courts is according to the rules of Civil or Roman Law, and also of the Canon or so much of the Papal Law as has been received in this country. But such rules are but *leges, sub-graviori lege*, the common law having obtained the superintendency or supremacy over them. To revise those rules seems to be a very eligible mode of adoption. Much of the old procedure and practice may be well abolished, new rules and orders introduced, and assimilated to those of the Superior Courts of Common Law. Let the whole, by legislative authority, be submitted to Her Majesty the Queen, in Council, for approbation, sanction, and regulation thereof.

Let that shapeless congeries of Papal Canon Law, received into this country from the time of the Conquest down to the Reformation, be examined and reformed. Let us have a new expurgated edition of Lyndwood's Provinciate translated into English by competent persons, acquainted with Ecclesiastical Law. In fact, we require a new *Reformatio Legum Ecclesiasticarum*, as the one prepared by Cranmer never received the Royal assent, the youthful Monarch King Edward VI. dying prematurely; a work, says Lord Stowell, of great authority in determining the practice of these times, whatever may be its correctness in matters of law.' It is, however, frequently referred to in Ecclesiastical judgments and forensic arguments. But let us have a new edition, sanctioned by Royal authority. Clearly let it be ascertained how much under the heads of canons, constitutions, ordinances and synods, provincial or other ecclesiastical laws, or jurisdiction spiritual, can now be enforced, as being neither

contrariant, derogatory, or repugnant to the laws, statutes, and customs of the realm, nor to the damage or hurt of the Queen's prerogative. Also, let the canons of King James I., A.D. 1603, be received and reformed. They have no statutable authority, and do not, *proprio vigore*, bind the laity, only so far as they are agreeable to the ancient Canon Law received in this country prior to the statute of 25 Henry VIII.

Why Archbishops and Bishops, in addition to their onerous duties, should aim at personal adjudication in their Diocesan Courts, rather than by judges who have had a *legal* training, is a matter calculated to excite apprehension. But in exact ratio that this disposition on the part of the Episcopal Bench has been manifested, on the contrary has been exhibited, on the part of the laity, a tendency to eliminate altogether the judicial from the Episcopal function. Prior to the Norman Conquest, it is true, the Bishop and the Earl sat together in the same Court, as civil magistrates; but certainly not to adjudicate ecclesiastical questions on the principles of Roman Canon Law, for it was not then introduced. Subsequently both sat in the Aula by virtue of their baronial estates, as they now sit in the House of Peers. But the proposal now made that the judges of the land should merely sit in Court as the bishops' assessors is rather derogatory to their exalted position. Not that by any means the study of this important branch of legal knowledge should be discouraged; nay, those who have had an extensive theological and legal training, and have attained unto a comprehensive knowledge of ecclesiastical law (which has the closest relations to the principles both of the divine and moral law), are the best qualified for the episcopate. And Her Majesty should be empowered to call such to her Councils, even if not archbishops or bishops; otherwise such as Bishops Gibson, Jeremy Taylor, and Dr. Burns would be excluded.

As to the exercise of discretionary power now claimed as a matter of expediency, in putting or refusing to put the Ecclesiastical Laws, into execution, this proposal re-

quires the gravest consideration. In all legal matters, the exercise of a discretionary power should be guided by precedent, and be overruled, if necessary, by competent legal authority : not by caprice or tyranny.

The late Lord Westbury observed, in a late Session of Parliament (29th Feb. 1872), that the proposal that the Bishop should hold the door of a Court, and let no one enter it without his sanction, might have been listened to prior to the Reformation ; but it could not be necessary to discuss it now. In the House of Commons, in Charles the Second's reign, by a majority of 168 to 116, it was decided : " That penal statutes in matters Ecclesiastical cannot be suspended but by an Act of Parliament." From the time of Henry the Eighth to 1840, any layman might institute a suit for a Breach of the Law Ecclesiastical, the consent of the Judge being necessary only so far as to make provision for costs, and to prevent frivolous and vexatious suits. In 1758, Sir George Lee, in the case of *Argar v. Holdsworth*, said a clergyman might be prosecuted by any one " for neglect of his clerical duty." In 1808, again, in the case of the office of Judge promoted by Bishop, His Majesty's *Procurator General v. Stone*, Sir William Scott used the following words : " It is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one who is desirous to avail himself in a proper manner." But now the proposed formula is : If the Bishop should see fit. On the contrary, the late Bishop of Exeter, Dr. Philpotts, observed publicly : " There is my own son (a Clergyman) sitting beside me ; and I would not spare my nearest or dearest relation, if any Ecclesiastical offence were brought against him." A proper investigation should take place, if the complaint were made in the proper way. The three chimerical old ladies, therefore, residing in the Channel Islands, the utopian ideal of an exuberant episcopal imagination, recently depicted in the House of Lords by a fervid eloquence, need not appal clerical apprehensions.

Hic murus aheneus esto, nil conscire sibi, nulla pallescere culpa.

In any well digested reform of the Ecclesiastical Courts, and procedure, there seems to be called for the repeal or amendment of the present Church Discipline Act, 3 & 4 Vict., cap. 86. This Act was loosely drawn. It has been spoken of by Sir Jenner Fust and Dr. Lushington as requiring amendment, which, to some extent, has been secured by the interpretations of the Judges. Such emendations or interpretations might usefully be re-enacted, but by all means abolish the preliminary inquiry in clerical suits. It assumes for the accused all the aggravations of a trial, without affording him the privilege of a defence; for the inquisition or investigation of the conduct of the accused is not the commencement, or any part of the suit. The report, even if adverse, is only the opinion of five clerical gentlemen, as to there being *prima facie* evidence, as a ground for instituting a suit. Lord Justice Knight-Bruce, in the case of *Denison v. Ditcher*, remarked on the loose and inaccurate language in this Act, yet the Legislature had made a sufficient distinction between a suit properly so called, and the preliminary inquiries out of which a suit might arise. Even as to the filing of articles, and the service of the same, these processes may be disregarded by a clerical defendant in a suit as a mere nullity. In fact, till he be served with a citation from an Ecclesiastical Court, under the 9th & 10th sections, a suit will not commence. Should not the law of England be as merciful as the Roman law: *Semper in dubiis benigniora præferenda*.

As to those Ecclesiastical Fees paid to Officials, even the Attorney-General himself has admitted many of them might be well abolished. In many instances, there is no pretence for their payment. Those officials, in fact, are paid for doing nothing. And certainly it is a grave question whether any longer an interested class of men are to receive payment of fees at the expense of the nation, without detriment to the State, unless some duty be discharged, some service rendered.

The Public Worship Bill, brought in this Session, containing the Amendments of the Earl of Shaftesbury, embraces

nearly the whole of the reforms in the Ecclesiastical Courts, contemplated here. They demand immediate Legislative sanction, and admit of no further delay without injustice to the nation. Nothing less than this will be satisfactory. It is sufficiently proved to be necessary; and it behoves the Government to remedy the same without delay.

VIII.—THE REGISTRATION OF BIRTHS AND DEATHS BILL, 1874.

THE present time will not be considered inopportune for making a few remarks upon the Bill, now before Parliament, to amend the registration of Births and Deaths in England.

It has been calculated that out of a million births, twenty thousand go unregistered; and that among the burials of still-born children is included a considerable number who were born alive. The Bill in question proposes to remedy this double evil; and, while postponing any notice of its other provisions, we will endeavour to estimate how far this piece of legislation would be likely to be effective in these two cases.

First, as to the present law of registering births: It is the registrar's duty "to inform himself of every birth which occurs in his district," and to register the same, free of charge, within forty-two days. After forty-two days and within six months; a birth can only be registered on payment of seven and sixpence; after six months, not at all.

Under this state of the law, it is certain that many births will go unregistered. That a registrar, however careful, should "inform himself of every birth" which occurs in a large district, is a patent absurdity; and it is surprising only that the average of unrecorded births, due to the carelessness

of parents and insufficient information of registrars, should be so low. Indeed, if they reach only two per cent., it speaks well for the general information of registrars.

Next, as to the proposed legislation: Any person having charge of a child is to be an additional qualified informant of its birth. It will still be "the duty of the registrar to inform himself carefully of every birth occurring in his district." If a birth has not been registered within forty-two days, the registrar can require the attendance of a qualified informant to give the particulars up to three months from the date of birth, but without fee. After three months and within twelve, the registrar can require a qualified informant to give the particulars, and to pay a fee. After twelve months, a birth can only be registered by authority of the Registrar-General, and payment of an additional fee. The additional qualification of "any person in charge," for an informant is not without objection, embracing as it does every shade of individual from nurse-girl to baby-farmer.

It seems almost incredible that a birth should ever go unregistered because of the non-existence of any person possessing the old qualifications, namely, father, mother, occupier, overseer (in case of foundling), guardian, and any person present at the birth. And if these qualifications have been found sufficient in practice, the proposal to extend the responsibility of registering a birth to a larger number of persons, is at once unnecessary and mischievous; inasmuch as these additional people would rarely know any of the facts to be registered of their own knowledge, and would give any information, however imperfect, just as they were told to the registrar.

It will be observed that miracles are still expected, under the new Bill, at the hands of registrars. They are still "to inform themselves of every birth occurring in their district," and to register the same. This appears to be the alternative of compulsory registration. Either impose a task on registrars, involving a loss to the registration of two per cent., or make the giving notice of a birth obligatory

on the parents, in which case the births escaping registration would probably be less than one per cent. It is evidently the opinion of those who framed the Bill, that so slight a gain would not warrant the imposition of pains and penalties. It is without doubt, however, that a small penalty for omitting to give notice of a birth, within reasonable time, say, within a month, would materially lessen the number of unregistered births, and be of great service to registrars. The provisions for registering births so long after their occurrence, at twelve months and upwards, may be counted on to diminish the number that go unregistered slightly; but our trust is in a few persons, naturally well informed of the birth, who shall be required to give particulars of the same, very soon after it occurs, the sooner the better, to the registrar.

With regard to the proposed legislation in registering deaths, it is remarkable that clause seventeen in the Bill orders a registrar, upon receipt of a notice, written by whom does not appear, of the occurrence of a death, to issue his certificate for burial. This provision is supposed to allow further time for completing the information, but does it not also open the door to improper burials? The certificate for burial should only be issued by the registrar after the complete registration of the death; and no burial should be allowed without its production.

To prevent the burial of deceased children as still born, clause eighteen imposes a penalty upon any person, having authority in any burial ground, who shall permit the body of a still-born child to be buried, without first having a certificate delivered to him, stating that the child was not born alive, signed by a medical practitioner, or a declaration to the same effect, signed by some person who would have been a qualified informant of the birth, if the child had been born alive, or a coroner's order. The grave objection to this is that a declaration, signed possibly by an ignorant or venal attendant, will be equally effective with a coroner's order or medical certificate.

As an ineffable boon to all who will have to master the details of this new legislation and assimilate it with so much of the old, upon the same subject as is unrepealed, it is earnestly to be hoped that the present opportunity will not be missed to consolidate the law respecting the registration of births and deaths on land as well as at sea; and if this appeal may be supplemented by another, equally earnest, and by no means unimportant as affecting the position of a large number of persons, peculiarly qualified to fill the office of registrar, we would ask that Boards of Guardians be enjoined, in filling up these appointments, to consider carefully the doubtful qualifications of women, in consideration of their superior opportunities of "informing themselves of every birth likely to occur in their district."

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CORRESPONDENCE.

THE RULE OF THE ROAD AT SEA.

To the Editor of the LAW MAGAZINE.

SIR,

As you have twice noticed this subject, may I be permitted to put before you the present state of the question?

On December the 15th, a despatch from the Duke Decazes was forwarded, through Lord Lyons, to the Foreign Office. It stated that, "independently of this special point, and taking a more general view of the subject, the question arises, whether the provisions of the International Regulations of 1862 offer guarantees sufficiently powerful to prevent such disastrous collisions as that which has just caused the loss of so many human lives. This is a point to which I would beg your Excellency to be so good as to call the attention of your Government, and one which, it appears to me, might be the subject for the consideration of an International Conference, or, at all events, of a mixed Anglo-French Commission, whose labours might subsequently, as in the case of the Regulations of 1862, be submitted for the consideration and approbation of the other maritime powers. I shall be happy to learn that the Cabinet of London shares the wishes of the French Government in this respect."

In reply, a *Memorandum of the Board of Trade* (without signature) was returned, stating that, "as regards the Steer-

ing and Sailing Rules of 1862, the Board of Trade are advised that, though no material alteration in them appears to be necessary, there are various points of detail in which additions, and amendments deserve consideration.”—(*Parliamentary Proceedings*, 1874.)

In February, Germany intimated that “our Admiralty will be much pleased by an offer of the English Government to attend an International Inquiry into the operation of the Steering and Sailing Rules, as proposed by the French Government,” adding, “no doubt, all naval men must have great interest in the matter, and the question of *the Rules of the Road at Sea* properly settled in a mixed commission, and adopted by all nations, will save many lives.”

At the same time Sweden stated that “Her Minister of Marine had addressed to the Minister of Foreign Affairs a note referring to the probability of a mixed commission being appointed to inquire into the operation of the Steering and Sailing Rules, and to request him to secure a right for Sweden to be represented in the same.”

On Tuesday, the 9th inst., it was announced from Berlin that “the German Chancellor proposes to take the initiative in negotiations which are to lead to the adoption of an International Code of Maritime Law. Prince Bismarck will, it is added, shortly make overtures to various Governments interested in maritime affairs, with a view to bringing about this object.”

The following has been received from Washington, June 17:—“The Bill for the appointment of an International Commission, to study the means of providing for the safety of ocean travelling, passed the Senate to-day.”

Yours obediently,

WILLIAM STERLING LACON.

LAW EXAMINATIONS.

BAR EXAMINATIONS.—At the general examination of students for Trinity Term, 1874, the Council of Legal Education awarded certificates to the following gentlemen:—Ainslie Douglas Ainslie, David Alfred Aird, Robert William Broomfield, Arnold Jeffries Cleaver, John Elliot, James Anson Farrer, John Gerald Laing, Henry Boyes Mugliston, Frederick York Powell, John Earle Raven, Charles Stubbs, Robert Wallace, and Walter Henry Wilkin, of the Middle Temple; Charles Edward Eardley Childers, John Frederic Clerk, Henry John Wastell Coulson, Alfred Dobson, John Conrad Gie Kunhardt, Thomas Massey, Augustus Mirams, Joseph William Pullen, George Readman, Frederick Henry

Thomas Streatfield, Richard Henry Tidswell, of the Inner Temple; John Goode, John William Brodie Innes, Venkatakristnama Naidu Pokala, Henry Yorke Stanger, of Lincoln's Inn, Esqrs.

CALLS TO THE BAR.

Trinity Term, 1874.—The under-mentioned gentlemen have been called to the degree of Barrister-at-Law..

LINCOLN'S-INN.—John Gent, Esq., M.A., Oxford, Fellow of Trinity College; Arthur Fraser Walter, Esq., B.A., Oxford; John Goode, Esq., University of London; Harry Greenwood, Esq., B.A., Cambridge; Henry Yorke Stranger, Esq., B.A., Oxford; Tancred Law Student; Robert Kedington Rodwell, Esq., M.A., Cambridge, Fellow of Emmanuel College; Edward Pengree, Esq.; George Henderson, Esq., M.A., Cambridge, Fellow of Pembroke College; Robert Welch Mackreth, Esq.; John Theodore Dodd, Esq., M.A., Oxford; Francis Edward Armitsead, Esq., B.A., Oxford; Louis Edgar Agostini, Esq., University of London; Aldred William Rowden, Esq., Balliol College, Oxford; Charles Edward Cree, Esq., B.A., Oxford; Goronoske Yoshiyama, Esq., of Nagato, Japan; Cumbumpati Sabapathi Iyah, Esq., University of Madras; and Montagu Clementi, Esq., Captain Bengal Staff Corps.

INNER TEMPLE.—Henry Gribble Turner, Esq.; Arthur Cordery, Esq., B.A., Oxford; Thomas Stewart Omond, Esq., M.A., Edinburgh and Oxford, Fellow of St. John's College, Oxford; Adam Henry Bittleston, Esq., B.A., S.C.L., Oxford; Seymour Henry Knyvett, Esq., B.A., Oxford; George John Courthope, Esq., B.A., Oxford; Frederick Henry Thomas Streatfield, Esq.; Edward William Hawker, Esq., LL.B., B.A., Cambridge; George Mallows Freeman, Esq., B.A., Oxford; William Ward Cook, Esq., B.A., Oxford; Herbert Baring Garrod, Esq., B.A., Oxford; William Denman Benson, Esq., B.A., Oxford; Richard Ord, Esq., Oxford; Harry Chadwick, Esq., B.A., Oxford; Jasper Myers Richardson, Esq., B.A., Cambridge; Thomas Shepherd Little, Esq., B.A., Cambridge; Walter Long Boreham, Esq., M.A., Cambridge; Eustace Morphett, Esq., B.A., Oxford; George Pearson Wheeler, Esq., B.A., Dublin; Edward Crofton, Esq., M.A., Oxford; John Francis Walker, Esq., M.A., Cambridge; John Henry Pelfy Simpson, Esq., Cambridge; Frank Ricardo, B.A., Cambridge; Henry Tullie Rivaz, Esq.; John Edward Courtenay Bodley, Esq., Oxford; Augustus Mirams, Esq., Cambridge; William Evans, Esq., B.A., Oxford; John Francis Jerrard, Esq., London; Walter Lawry Buller, Esq.; Charles Edward Eardley, Childers, Esq., B.A., Cambridge; George M'Watters, B.A., Queen's University, Ireland; Thomas von Donop Hardinge, Esq., B.A., Dublin; Thomas Edward Fairfax, Esq.; and George Douglas Harris, Esq.

MIDDLE TEMPLE.—William Charles Boden Elwell, Esq., University College, Oxford, B.A.; Ainslie Douglas Ainslie, Esq.; William Wallace Rodger, Esq., of Exeter College, Oxford; Captain Edward Gladstone; Edward Henry Palmer, Esq., of St John's College, Cambridge, M.A.; Claude Fitzroy Wade, Esq., of

LAW EXAMINATIONS.

Magdalen College, Oxford, B.A.; Walter Meyrick North, Esq., of Brasenose College, Oxford; Robert Townley Caldwell, Esq., of Corpus Christie College, Cambridge, M.A.; William Ogle Grey Younghusband, Esq.; Frederick York Powell, Esq., of Christ Church, Oxford, B.A.; Vivian Montague Stanley Reed, Esq.; James Webster Bird, Esq.; Philip Morton, Esq.; Horatio Nelson Lay, Esq., C.B.; Charles Stubbs, Esq., of Corpus Christi College, Cambridge, B.A., LL.B.; Arthur Frank Ryas, Esq., of Trinity College, Cambridge; Alexander Charles Nicoll, Esq., Charles Clare Scott, Esq.; John Page Middleton, Esq., of Trinity Hall, Cambridge; Charles Henderson Scott, Esq.; William Henry Charles Wilson, Esq., of the University of London; Samuel Archibald Locke, Esq.; Francis Henry Dillon Bell, Esq., of St. John's College, Cambridge, B.A.; Robert Wallace, Esq., of Dublin University, B.A.; Colonel John Elliot; Robert Philpot, Esq., of Trinity College, Cambridge, B.A.; Francis Alfred Carter, Esq.; Lewis O'Neill, Esq.; Lieutenant Meering Bloomfield Leager, and George William Aine, Esq., LL.D.

GRAY'S INN.—The annual prize, amounting to £25 (an Exhibition founded by Mr John Lee, Q.C., LL.D., late a Benchet of the Inn), for the best essay on "The Origin, Progress, and Present State of the Equitable Jurisdiction of the English Courts," has been awarded to Mr. Frederick Huxley; and the Society's Scholarships have been also awarded as follows:—The Bacon Scholarship (of the value of £45 per annum, tenable for two years) to Mr. M. W. Mattinson; and the Holt Scholarship (of the value of £40 per annum, tenable for two years) to Mr. W. T. Waite. The subject of examination for these Scholarships is "The History of England, Political and Constitutional." The subject of the Lee Prize Essay for next year is "The Rationale and Application of the Doctrines of Estoppel and Quasi-Estoppel" in the Administration of Law and Equity in England.

FINAL EXAMINATION.—At the examination of candidates in the Easter Term, 1874, for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommend the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Arthur Chisolm Moore; Charles Alfred Pryce; William Alfred Pitt; Thomas Arthur Dyson; John Harry Gregson; William Robert Lloyd Jones. The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Moore, the prize of the Honourable Society of Clifford's Inn; to Mr. Pryce, the prize of the Honourable Society of New Inn; to Mr. Pitt, Mr. Dyson, Mr. Gregson, and Mr. Jones, prizes of the Incorporated Law Society. The examiners have also certified that the following candidates, under the age of 26, passed examinations which entitle them to commendation:—John Thomas Worth; Charles Payne Hennessy; Albert Gibson. The examiners have accordingly awarded them certificates of merit. The examiners have further announced to the following candidates, to

the questions at the examination were highly satisfactory, and would have entitled him to a prize if he had not been above the age of 26: Thomas Pearce. The number of candidates examined in this term was 137; of these 126 passed, and 11 were postponed.

APPOINTMENTS.

The honorary degree of LL.D. has been conferred on the Lord Chief Justice of England, by the University of Cambridge; and the degree of D.C.L. on Lord Justice Mellish by the University of Oxford; Mr. Charles Henry Walton, Master in the Court of Exchequer; Mr. R. G. Raper, District Registrar of the Court of Probate at Chichester.—*Natal*.—Mr. Henry Conner, LL.B., has been appointed Chief Justice of the Supreme Court.

THE SUMMER CIRCUITS.—*Midland* (Mr. Justice Denman and Baron Amphlett);—Warwick, Monday, July 6; Derby, Monday, July 13; Nottingham, Friday, July 17; Lincoln, Wednesday, July 22; York, Tuesday, July 28; Leeds, Monday, Aug. 4. *North Wales* (The Lord Chief Justice of England):—Newtown, Friday, July 17; Dolgelly, Monday, July 20; Carnarvon, Thursday, July 23; Beaumaris, Monday, July 27; Ruthin, Thursday, July 30; Mold, Saturday, Aug 1; Chester, Wednesday, Aug. 5. *South Wales* (Mr. Justice Quain):—Haverfordwest, Saturday, July 4; Cardigan, Wednesday, July 8; Carmarthen, Saturday, July 11; Cardiff, Wednesday, July 15; Brecon, Thursday, July 30; Presteign, Monday, August 3; Chester, Wednesday, August 5; *Northern* (Mr. Justice Archibald and Baron Pollock): Appleby, Saturday, July 4; Durham, Tuesday, July 7; Newcastle, Monday, July 13; Carlisle, Saturday, July 18; Lancaster, Thursday, July 23; Manchester, Monday, July 27; Liverpool, Saturday, August 8; *Western* (Chief Justice Coleridge and Mr. Justice Brett):—Winchester, Thursday, July 9; Salisbury, Thursday, July 16; Dorchester, Monday, July 20; Exeter, Thursday, July 23; Bodmin, Thursday, July 30; Wells, Tuesday August 4; Bristol, Saturday, August 8. *Home* (Baron Bramwell and Baron Cleasby):—Hertford, Wednesday, July 8; Chelmsford, Monday, July 13; Lewes, Thursday, July 16 (at Chelmsford and Lewes civil business will be taken on the commission days); Maidstone, Monday, July 20; Guildford, Monday, July 27. *Norfolk* (The Lord Chief Baron of the Exchequer, and Mr. Justice Keating):—Oakum, Wednesday, July 8; Leicester, Thursday, July 9; Northampton, Monday, July 13; Aylesbury, Thursday, July 16; Bedford, Monday, July 20; Huntingdon, Thursday, July 23; Cambridge, Saturday, July 25; Bury St. Edmunds, Wednesday, July 29; Norwich, Saturday, August 1. *Oxford* (Baron Pigott and Mr. Justice Lush):—Reading, Wednesday, July 8; Oxford, Saturday, July 11; Worcester, Wednesday, July 15; Stafford, Monday, July 20; Shrewsbury, Tuesday, July 28; Hereford, Friday, July 31; Monmouth, Tuesday, August 4; Gloucester, Saturday, August 8. Mr. Justice Blackburn will remain in town.

Edward Gladstone;

College, Cambridge, &c.

THE LAW MAGAZINE AND REVIEW.

No. VIII.—Vol. III.—AUGUST, 1874.

I. THE GROWTH OF THE LAW OF LIBEL.

PART I.

I.—BEFORE THE ABOLITION OF THE STAR CHAMBER.

NO portion of our law has been more often referred to as illustrating what is called its inconsistent and unsymmetrical character than the law of libel. Decisions remain in our reports of the most contradictory character. By one which has the weight given to it by a formal resolution of the judges the mere publication of false news was held libellous, while now it is difficult to say what news may not be published. Statements, corresponding to what appear in almost every newspaper, have been repeatedly pronounced libellous. Criticism on government has been judicially declared to be worse in its effect, and, therefore, to require more jealous watching than comments on private persons, while now the Courts hold that within almost certain indefinite limits it is for the public benefit that Her Majesty's Government should be submitted to the fullest amount of criticism, and even though that criticism should be constantly unfair, both in the opinion of the judge and of the jury, yet our Courts leave the offender to such justice as he may obtain at the bar of public opinion. Attacks on the doctrines of the English Church, or even on the Government of that Church by bishops, have been punished as libels, on the ground that such attacks are injurious to

public morality; while now it may safely be said that not a week passes without not merely attacks on Christianity itself, but the open proclamation of opinions, the barest statement of which would, even at the opening of the present century, have subjected the offender to very heavy penalties.

And yet when the law of libel is looked at from another point of view, this inconsistency vanishes, or is seen to be more apparent than real. No department of English law, not even excepting the law of evidence, better illustrates the advantages which judge-made law possesses over law made by other means, of keeping legislation abreast of public opinion. The law of libel, with one or two modern exceptions, which will at once recur to the reader, has been made by the tribunals rather than directly by the legislature. The Courts, in giving their decisions on the cases of libel before them, have reflected the general public opinion of the country. When the High Church party carried everything before them, and were able to subject the Dissenters to the penalties of the Clarendon code, the Courts declared it libellous to attack the institution of episcopacy. When Locke's teaching had leavened the public opinion of the country, the Courts began to allow comments on the Government, which would not have been tolerated under Charles the Second. When the influence of the French Revolution and the general intellectual movement by which it was in great measure caused, began to be felt, the Courts began to hesitate about punishing offenders for blasphemous libels, and so far has public opinion advanced in favour of religious liberty that it may well be doubted whether any verdict could be obtained against a writer of the present day, for any honest expression of religious or irreligious opinion. So too when a majority of Englishmen thought that Government should not be made the object of attack, the Courts held very slight charges against it to be libellous. When the majority came to understand that public criticism was probably the best means of preventing and of correcting

abuses, the Courts held, that any attacks not merely on the Government but on the public acts of public men, were justifiable. Indeed the theory on which our Courts have acted has always been that the interest of the community was the main object to be kept in view, in framing the law of libel. Opinion has widely varied as to what is for the interest of the community. During the time of the Star Chamber the theory was that which prevails in Turkey, and to a less extent in France at the present day. The people were to be governed, not to govern; their morals were to be protected as a father would protect those of his children. The people must be taken care of. Attacks on the Government must not be allowed; because, as the Government was something outside the people, with opposite interests and duties, its existence would be imperilled if it were allowed to be the object of attack. The earlier notion of our fathers that Government consists of a king and council chosen by and acting for the people had been at the time when the law of libel becomes of importance obscured by the teachings of the ecclesiastics and church lawyers who had drawn their knowledge of law, not from the ancient common law of the realm, but from the canon law. The later notion that Government consists and has consisted since the Act of Settlement of a king filling an executive office hereditary upon certain definite conditions in a particular family, and the people themselves as represented in both Houses of Parliament, had not yet become generally accepted, though Hallam and subsequent writers have made it abundantly clear, that the modern view had never been so altogether absent from the minds of our fathers as Hume and other writers not to the English spirit born would have us believe. The churchmen in particular threw their influence in favour of arbitrary government. The tradition of the church was the tradition of ancient Rome, the tradition of a law which declares *quod principi placuit legis habet vigorem*. So also with the

opinions and the morals of the people. Our theory now in regard to the former is that in the conflict of truth and error, truth will prevail; that the elicitation of truth is hindered rather than advanced by the attempt of authority to protect it, and in regard to morals that so far as the mere publication of an opinion tending to immoral conduct is concerned, it is better that the opinion should be left to public criticism than that its expression should be checked by the State. In both these respects the theory of Englishmen, three hundred years ago, was widely different.

Sir Henry Maine has pointed out the great difficulty which exists in making the progress of written law keep pace with the progress of public opinion, and he has observed that a system of equity, professing, like that of Rome as well as our own, to be above statute law, by virtue of its appeal to higher principles, is the most efficient means of preventing the crystallization which is always liable to take place when the law has an additional sanctity given to it in popular estimation by having become formulated in writing. If our system of judge-made law is to be included under the term equity used in this sense, then equity is undoubtedly the most efficient means of preventing crystallization. If not, then it may reasonably be maintained that judge-made law is the most efficient means which jurisprudence has yet fallen upon for preventing legislation from lagging behind public opinion. In the law of libel, undoubtedly law and public opinion have gone abreast. If a man knows the history of England he will have no difficulty in answering what would have been the dicta of the courts on questions of libel likely to come before them. But while judge-made law generally possesses the advantage claimed for it, the law of libel in a special manner has been the reflection of popular opinion, because the definition of the offence has always involved so many questions of opinion that, even before the passing of 'Fox's Act, juries have nearly

always been the judges of law, as well as of fact in cases of libel. It is only an apparent contradiction of the statement already made, that the law of libel is judge-made law, to say that the law of libel is especially jury-made law.

Regarding thus the law of libel as having its origin almost exclusively in the decisions of the courts rather than in the statute book, decisions varying greatly, and hopelessly in-harmonious, if not looked at in connection with the state of public opinion at which they were made, the historical method is obviously that which may be followed with the maximum of advantage in treating of the subject. Read together with the history, the decisions are in harmony; read only with each other they are discordant. For this purpose it is convenient to see what was the state of the law at various periods of our history.

The first of these periods may be closed with the abolition of the Star Chamber, which was one of the acts of the Long Parliament, in its first year of existence. The fact that the law of libel, during this period, was framed in, and administered by, the Star Chamber Court, is sufficient justification for making the first division of our subject terminate with the abolition of that court.

It is not difficult to see how the Court of Star Chamber came to have jurisdiction in cases of libel. In the early period of our history libels must have been less frequent and less damaging than now; less frequent because few could write, and less damaging because few could read. Then, too, it may well be doubted whether men attached so much importance as they do now to defamation of character. Our fathers, high and low, were in point of culture very little above the labourer of the present day, and in all probability, and, indeed, as we know from the "Canterbury Tales," and other early English books, spoke out their opinions of each other with much more freedom, class for class, than now. Noble and peasant alike, if slandered, would probably take their revenge by challenging the slanderer. In few instances

would the slandered persons be likely to seek redress at law. Hence it comes about that written defamation is a comparatively recent offence in our law. When, however, it had to be recognised by the tribunals, the place where it seemed to belong was in the criminal division. As that division contained no room for it, it was relegated to the Court of Criminal Equity, whose very object was to supply the deficiencies of the Criminal Law, to award punishment for offences which none the less deserved it because they were not such as could be placed under the divisions into which the Criminal Law was classified, and, generally, to see that no wrong-doer escaped punishment by reason of the rigidity or technicality of the law.

Accordingly we find that though actions for verbal slander were not unfrequent—the earliest case reported is in 1463, and eight others only appear down to 1539; and though there is reason to believe that proceedings before the Ecclesiastical Courts for slander in writing were not uncommon, the action for libel is nearly, if not altogether, unknown in our ordinary courts before the Restoration. Lord Camden, indeed, expressly affirms that no cases of libel heard before the King's Bench are of earlier date than that event.*

The Court of Star Chamber took under its care all the various facts and crimes which constitute libel, namely, libels against private individuals, giving rise to a civil remedy, libels regarded as crimes for which a proceeding, by indictment, on behalf of the Crown, or by criminal information, were the means of punishment and redress, and so-called libels against the Government, including, under this vague term attacks on the Government, or on any part of it, writings which tend to cause immorality, and the publication of any writing which is thought to be against the public interest.

It is easy to see how the Court came to take this jurisdiction upon itself when we remember what was its constitution.

* *State Trials*, vol. xix., p. 1069, edition 1816.

The popular impression is that the Court of the Star Chamber was the mere creature of the Sovereign's will, and was altogether an unimportant court. On the contrary, it was regarded by our fathers as the most illustrious court which they knew. The King himself occasionally presided, and its members included the most exalted men in State and Church. The Lord Chancellor, the Lord Treasurer, the Archbishop of Canterbury, with a number of officers of high rank were usually present on important occasions; and others, of lower rank to them only, were present with them. It was the King's Court, the *Aula Regis* itself, out of which had grown the Court of King's Bench and the Court of Chancery. The theory upon which it acted was that there were wrongs which could not be remedied by the ordinary course of law, and which could not immediately be overtaken by legislation. The forms of law which our early lawyers regarded with religious conservatism bating not a jot, or tittle of them, did not cover all the classes of torts or crimes. Even where they did, poor men would occasionally be afraid of making use of them against the rich and powerful. It was necessary that there should exist a court with unrestrained power to do substantial justice, occasionally to set aside forms to disregard rules of pleading and of evidence, to take care that no wrong went undressed or crime unpunished on account of mere technicality. The Court of Star Chamber did take such care. It disregarded forms, or broke them thoroughly without difficulty. It was bound by no rules of evidence. It sat in vacation as well as in term.* It appointed and heard only its own counsel, thereby, says Hudson, not being "troubled with silly or ignorant barristers, or such as were idle and full of words." It was presided over ordinarily by the Lord Chancellor himself, who had the right of honouring any of the other judges by summoning them to sit with him. The Court, under James the First and Charles, made a bad use of its powers, and had to be

* *Collectanea Juridical* Vol. II., p. 5, edition undated. Hudson's Tract.

got rid of as a nuisance. But one can readily believe that on the whole it was for the interest of the country for some centuries that a court with such powers should exist, and, recalling many instances where criminals have escaped within the last few years, on grounds of the most trivial technicality, and where the country has been scandalized by miscarriage of justice, it is impossible to repress a sigh over its well merited destruction.

From the invention of printing the Star Chamber had carefully watched the publication of books. The theory on which it acted was one which we have retained in regard to plays, but have got rid of altogether in regard to books. The Court before publication would examine the books to see if they contained any libellous matter. It constituted itself a *censor morum*, and what with questions of slander and libel of private persons and questions of publication of news, of writings against the State or some of its institutions, the Court before long found that the printing press had very largely added to its work. From the introduction of the press it rigidly controlled also both the printing and the publication of news. Tyndale and Patmore, two London merchants, were brought before it at the instance of the Bishop of London, for dispersing a new edition of Tyndale's Bible, which they had been able to bring out in consequence of the first edition having been bought up and destroyed. They were fined £1840, and in addition were condemned to ride on horseback with their faces to the horses' tails, papers on their heads and some of their books tied around them. After having completed a long round they were to throw their books into the flames. In 1540, a knight was fined a heavy sum for having permitted a book called Martin Prelate to be printed in his house. This Court, a few years later, committed a man to prison for prematurely announcing the birth of a prince.* In 1558, it ordered all persons who corrupted the text of the Bishop of London's book to be deprived of their license to print. In 1567 it sent a man to the Fleet, and imposed a heavy fine on him, for

**Lansd. MSS.*

keeping in his house a book against the Established Church.* One Vallinger was fined £100, ordered to stand a day in the pillory at Westminster and one day in Cheapside, to lose an ear at each place, and to be imprisoned during the Queen's pleasure, for a libel against Government and religion.†

As everyone knows, it was not until the reign of James I. that the Star Chamber attracted attention on account of its manifest injustice. Every vice which made it hateful to our fathers, including the infliction of torture and of monstrously cruel punishments, is continually presenting itself during James's reign.

In 1619 Wraynham was fined £1,000, set in the pillory, and had to lose his ears for presenting a slanderous petition to the King against the Lord Chancellor. In 1630 a Bill was filed against the Earls of Bedford, Warwick, and Clare, and Sir Robert Cotton, Selden, and another for publishing a seditious manuscript, that is, a paper in which the right of Parliament to its constitutional privileges was maintained as against the arbitrary will of Charles the First. Three years earlier three fiddlers were prosecuted for singing a song against the Duke of Buckingham. It is satisfactory to know that he was extremely unpopular. The burden of the song and the libellous words were—

“ The clean contrary,
Oh! the clean contrary way,
Take him, Devil, take him.”

Which, let us hope, the devil did, for if such as he did not go to the devil, it is difficult to see the use of having one. The poor fiddlers were fined £500 each, and ordered to be whipped and put in the pillory at Cheapside, Ware, and Staines. In the same year, John Maud was found guilty of having said that the King went to mass with the queen. He was committed, ordered to acknowledge his offence in all the Courts of Westminster, at the Assizes of Suffolk and Huntingdon, and at Paul's Cross, and, in addition, sentenced to pay the enormous fine of £5,000.‡ In 1637 the Court,

* Burns' Star Chamber, p. 64. † Ib. p. 76.

‡ Burns's Star Ch., p. 108.

besides inflicting a fine of sixty pounds on a man who had written libellous letters,^o ordered him to be ducked from a cucking stool at Holborn Dike. A certain Mr. Bowyer slandered Archbishop Laud, in saying that that prelate allowed £500 a-year to the Pope and procured him £1,700 a-year. In all probability this was a common scandal going about from mouth to mouth, and of the kind which are always present when men's minds are excited, as they were during the eleven years interval, between 1629 and 1641. This was the period, the reader will remember, during which Charles was trying his new measures, endeavouring to rule England without a parliament, to impose taxes of his own mere will, and to give the Ritualistic party in the Church exclusive possession. For the slanderous words Bowyer was sent to hard labour at Bridewell for life, fined £3,000, put in the pillory, burned in the forehead, and the manuscript adds a significant "&c., &c." In all probability Laud himself was answerable for the extreme severity of his sentence. His heart was full of bitterness. He alludes to this sentence in his diary, and concludes by saying "his censure is upon record and God forgive him." There is no reason to believe that the archbishop either forgave him or remitted any of the sentence. When Laud had himself to answer for his many offences before a parliament which was justly incensed against his cruelties and his illegal acts, it was charged against him that he had been the principal instigator of the many cruel punishments which the Star Chambers had of late years inflicted. The notes of his friend Windebank clearly prove his severity. In all cases he seem to have advocated the infliction of the highest penalties. Where the Court inflicted the heavy fine of *£5,000, Laud stood alone for a fine of £10,000. In 1630 Leighton, the father of the archbishop of that name, was fined £10,000 for writing, "Zion's Plea against Prelacy," and "The Looking Glass of the Holy War." He was further to be deprived of his ministry, to be publicly whipped, pilloried,

to lose his ears, to have his nose slit, his face branded with S.S., for sower of sedition* and to be sent to the Fleet for life. This sentence was executed in the midst of frost and snow. After being whipped and exposed once, his back and face being still sore and disfigured, he was at the end of a week again whipped and then sent to prison. And yet this was a clergyman, eminent alike for his office, his learning and his piety.* Such a sentence was entirely after Laud's own heart. While the Court was pronouncing it, Laud pulled off his cap, and at its close gave God thanks. Lord Clarendon says of him that he never abated anything of his severity and rigour towards men of all conditions.† On the 11th of July, 1637, the Court of Star Chamber made the decree respecting books and printing, which drew forth Milton's *Areopagitica*. It placed restrictions on the importation and sale of books, upon type founders, printers, merchants and masters of ships, carpenters, smiths employed in making presses, and other persons. It prohibited any shopkeeper or other person, not having served an apprenticeship to a bookseller, from receiving, buying or selling "bibles, testaments, psalm books, primers, abcees, almanacks" or other books. It appointed twenty persons by name to have printing presses, and four persons to be type founders.

From the cases mentioned it will be seen that the Court of Star Chamber not merely punished libel but endeavoured to prevent it. It was a *censor morum* to an extent that has never been claimed by the Courts of Westminster. It regulated the number of printing presses. It inspected new pamphlets and books before they were published. It required each printer to be furnished with a license. Against libels on private individuals all it could usually do was to punish the libeller, but against libels on the Government or any

* Life of Archbishop Leighton.

† Clarendon Vol. I., p. 99.

member of Government, or against public morality, it did its best in the way of prevention.

It is obvious that the Court, in thus interfering with the expression of public opinion on matters of State and of religion, would have against it all those who were in favour of change. By its very existence and duties it would have arrayed against it the progressive party in the nation. In the reign of Elizabeth, and for a century after her death, that party was co-extensive with the Puritans. The opponents of the Romanizing tendencies in the church under Whitgift's guidance, and during the reign of James, were also the men who, under Yelverton, Bell, and the Wentworths, were doing their best to struggle against the attempts of the Sovereign to reduce the English Parliament to the condition in which the Kings of France had reduced the States General of that country. Authoritative teaching in the church went hand in hand, as it always has done, and as we venture to think it always will do, with authoritative declarations of absolute Government. The clergy who wished to introduce the ancient ritual were those who preached the doctrines of divine right. The men who claimed to exercise the right of private judgment in matters of religion, claimed the same right also in matters of State. The Star Chamber set itself to work to crush this liberal party, and carried out its resolution with a thoroughness which could hardly have been more complete. Its punishments were the most cruel ever inflicted by an English court. Fines which usually beggared the person punished, continental methods of torture new to English eyes and inflicted in public, imprisonment for life, were the penalties inflicted on those who dared to adopt the theology of Geneva, or to attack the Government in Church or State. In spite of these cruelties the new opinions spread. Englishmen sympathized with devout men and good citizens whose only fault was that they expressed opinions not liked by the bishops or court. The Star Chamber, finding its policy unsuccessful, concluded, as tyrants usually do, that it

was because there had not been enough of tyranny in it, and, under Laud, who either loved cruelty for its own sake, or was determined to carry out the policy of "thorough" in the Church, which Wentworth was trying in the State, the Court increased its severity. During the eleven years interval between the third and fourth Parliaments of Charles, the cruelties of the Star Chamber in the well-known cases of Williams and Osbaldiston, of Prynne, of Burton and Bastwick, and of John Lilburne, roused the indignation of the whole of the nation. Falkland and Hampden, as well as Pym and the more advanced leaders, were determined either to make a thorough reform of the Court of the Star Chamber, or to get rid of it altogether. Those who counselled the latter prevailed, and although we can well imagine that a reform of the Court might have been made, which would have allowed it to exercise many useful functions, although we have had to fill up by slow degrees the gaps in our judicial system which its abolition occasioned, yet we can neither wonder at the determination of the Long Parliament to get rid of it altogether, nor can we venture to assert that it would have been safe to have allowed it to be in existence during the reign of Charles the Second.

(To be continued.)

III.—THE SCIENCE OF LAW.*

JURISPRUDENCE cannot be said to be making much internal progress in England at the present time, although its study has increased with great rapidity during the last ten years. Its stationary condition is partly due to the same causes which produced its rapid growth—the vigour and individuality of its founders. At the time when Bentham (who may be considered as the pioneer of jurisprudence in

* The Science of Law: By SHELDON AMOS. London: H. S. King & Co., 1874.

England) appeared on the scene the law student's attention was almost exclusively occupied in mastering the extraordinary mass of technical and complicated details which then formed what was called "law." When a law suit was as often as not decided on some abstruse point of pleading, in utter contempt of the merits of the case, it was hardly likely that the lawyer should suspect the existence of any scientific connection between subjects which differed completely in their formalities or of any distinction between rights to which the same remedy was applicable. Nor was the state of jurisprudence abroad calculated to allure the student from his "disgusting study," as the Benthamites call it. Grotius and Pufendorf, indeed, enjoyed a great reputation, but the link between their speculations and the technicalities of English law was missing; all that was expected of an elegant writer on law was to premise some vague generalities on the state of nature or the origin of society, before plunging into the more profitable questions of whether an action should be brought in the *per* or in the *per and cui*, or in what cases a replication *de injuria sua propria* was applicable. Bentham not unnaturally thought this very absurd, and accordingly devoted all his energies to its reform; his systems of classification and nomenclature, all more or less artificial and impracticable,* and his sagacious proposals for the reform of procedure and the law of evidence, many of which have been since adopted, were the result. On the other hand, the iniquities of the English criminal law led him to consider with wonderful care and minuteness what should be the guiding principles in questions of guilt and punishment. But Bentham, "the great questioner of things established," looked upon everything from the legislator's point of view. His knowledge of the technical details of

* At least we are not aware that *canosyncratocoscopic ontology* is a phrase much used at the present day. Professor Amos, however, uses *dyslogistic*, which savours of Bentham, and *codification* has become a citizen of the world. Speaking of one of his own early productions, Bentham says: "Some will say it was better than anything I write now. I had not then invented any part of my new lingo."

law was almost nothing.* The idea of a science of comparative jurisprudence would have seemed ridiculous to him, and hence he and his personal disciples neglected and misunderstood Roman law. Read by the light of modern times, his writings on many subjects strike the reader as being more ingenious than solid, and others are antiquated owing to the execution of improvements which he advocated; but no student, even at the present day, can afford to neglect his "Traité de Législation," the immortal "Fragment on Government," and the "Traité des Preuves Judiciales." His individuality of mind and incisive style have left their mark on English jurisprudence.

In Austin jurisprudence found a willing and able expositor of its more technical side. In some respects, Austin was fortunate. His long residence in Germany had made him familiar with the writings of that brilliant series of jurists—Hugo, Warnkönig, Thibaut, Savigny, &c., who, starting from an accurate knowledge of Roman and German law, developed their theories and systems *à posteriori*, instead of spinning them out of their own brains after the fashion of Bentham & Co. Yet these jurists were as practical in their aims and appealed as much to Austin's acute common sense as Bentham himself, while the comparative study of Roman, German, and English law enabled Austin to see in the rules of English law, covered as they were by the rubbish of ages, institutions, common to all systems, and having a deeper reason than mere tradition. Another bond of union between him and the Roman-law jurists was their opposition to the so-called "philosophic" school of jurists, and the writers on the Law of Nature. As Professor Amos says, Austin "was just broad enough to free himself from Bentham, and just narrow enough to save himself from Kant and Hegel," but he omits to point out that this was as much

* "I was indeed grossly ignorant. Instead of pursuing any sound studies or reading any modern books of law, I was set to read old trash of the seventeenth century, and I looked up at the huge mountain of law in despair. I can now look down upon it from the heights of utility."—Works X. 84.

the influence of Thibaut and Savigny as of Bentham: we cannot agree with him that "the result of this philosophic tendency in Germany has been to merge the scientific treatment of law in the larger region of general ethical enquiry, and, consequently, instead of the science of law making an even and independent progress of its own, it has undulated with every wave of ethical speculation, and has consequently suffered the retardation incident to the growth of the most involved, because the most composite, branch of intellectual research." We venture to assert that the reader of Savigny or Vangerow, if undisturbed, might very well go on in happy unconsciousness that the relations between law and morality are of that "true and delicate" nature which Professor Amos describes. Is it possible that Professor Amos has confounded *Rechtsphilosophie* with *Rechtswissenschaft*?

We have said that Austin was fortunate in being able to combine the doctrines of Bentham and the German jurists. In some cases, however, Bentham had a narrowing influence on him; Professor Amos points out an instance of this in Austin's analysis of the term "International Law," and we recommend his remarks to the reader as a fair statement of the point.

Professor Amos gives a well merited word of praise to the labours of Sir Henry Maine in the field of legal history; he has certainly done more to popularize the theories of modern writers on the origin and development of law (points unduly neglected by Austin) by extracting them from unfamiliar books, and adding most interesting illustrations from Hindu law, than any English author, and Professor Amos is probably as much indebted to the "Ancient Law" and "Village Communities" as he is to Bentham and Austin, to whom those works are the necessary complement. Sir H. Maine's practice of stating conclusions without citing authorities for them has occasionally led Professor Amos to attribute to him the discovery of doctrines which are so familiar as to be practically the common property of jurists: his account of *obligatio* (p. 168) is an instance.*

* One of our contemporaries, in a notice of Professor Amos's book, gravely gives Sir H. Maine the credit of discovering that Bracton borrowed from the Roman law.

Since the publication of "Ancient Law" hardly any additions have been made to English jurisprudence, notwithstanding the gaps and defects in Austin's system requiring to be supplied and corrected, and in the few treatises on scientific jurisprudence which have appeared since Mr. Austin's death, his influence is strongly, we might almost say painfully, apparent. The theological school of speculative jurisprudence has found an able representative in Professor Lorimer, but as a rule modern writers seem content to walk in the steps of Bentham and Austin. Professor Amos has himself contributed to the literature of jurisprudence,* and the present work is, to some extent an abridgment of his larger book. After a careful perusal we think its value lies rather in giving a short and readable view of the present state of English jurisprudence than in throwing very much new light on the subject.

We confess that we opened the book with a slight feeling of dread. In a published lecture on the modes of studying jurisprudence Professor Amos insists on the student mastering logic, ethics, politics, and a few other subjects before he ventures to attack jurisprudence, and it is probably because we had not studied all those sciences with sufficient profoundness that we were unable to appreciate Professor Amos's large work on jurisprudence, which is written in a style worthy of a Hegel or a Schopenhauer, and comprehensible only to the initiated. But the present work is a great improvement so far as style is concerned; it is written for the most part with clearness, and its conclusions are generally sound, although not remarkable for originality; indeed, so far as the labours of Austin and Sir Henry Maine cover the subjects of which he treats, Professor Amos adopts their conclusions with hardly a variation. We may here remark that, beyond quoting a few passages verbatim from his favourite models, the author does not cite a single authority in support of his conclusions; this is a grave defect in the book. The reader is entitled to know whether the author has investigated the subject for

* *A Systematic View of the Science of Jurisprudence.* London, 1872.

himself, or whether he has taken it at second-hand, and the student wants to know where he can find detailed information.

We cannot say that we admire the plan adopted by Professor Amos in treating his subject; it consists in half explaining one subject, then half explaining several others, and then completing the explanation of No. 1. "In this way," says the author, "each fresh chapter throws light upon all its predecessors, and the first chapter is never completely mastered till after the study of the last." We are surprised that Professor Amos, who is an experienced lecturer, is not aware that an erroneous first impression is most difficult to eradicate. If he had adhered to the time-honoured method of first explaining the distinction between law and its cognates (morality, politics, legislation &c.), then defining primary conceptions, such as right, person, status, &c., and lastly explaining each department of law (ownership, torts, &c.) in its proper order of classification, the book would have gained much in clearness. As it is, our old enemy morality is continually starting up, like an irrepressible weed, until we begin to doubt the author's assertion that "the abstraction of law from its moral surroundings has nowhere been so completely achieved as by Englishmen," and the matter of the book is treated in an order which we venture to call chaotic. After seven chapters of introductory matter we have "Laws of Ownership," "Law of Contract," "Criminal Law and Procedure," "Law of Civil Procedure," "International Law," "Codification," "Law and Government." Trusts are treated of in connection with the relationship between Church and State, and Torts under Civil Procedure. In short, the title "Science of Law" is a misnomer; the book should have been called "Essays on the Origin, Nature, and Purposes of Law."

The first five chapters are fair statements of the modern theories on the origin of law, states, customs, equity, &c., in which the remarks on the nature of judge-made law and the permanence of equity seem to us particularly judicious. We

cannot but think, however, that Professor Amos takes too ethical a view of the object of law; he almost entirely leaves out of view the administrative, and what Savigny calls the *vermittelnde* or distributive, functions of law, where it is not a question of morality at all, but of expediency and convenience, as in the rules of priority and supplementary interpretation; these are peculiarly within the province of the jurist, because they are exclusively technical; he also seems to us to lay too much stress upon "moral responsibility" as a basis of legal duties; if the reader takes away the impression that intention has to be considered in all questions of tort, he cannot be blamed for doing so. The remarks on interpretation are somewhat meagre; the subject is treated incidentally as one of the means of indirect legislation, and not as a special branch of law relating to all kinds of legal documents. In chapter vi. we come to the elementary conceptions and terms. "A legal *person*," says the author, "is a human being, or aggregate body of human beings, looked upon as a subject of law." This implies that the fact of being human is of the essence of legal personality, but the distinguishing mark of a legal person is the capacity of having rights and duties. Professor Amos thinks that slaves in historical times have always been legal persons, "as shown by the penalties to which their masters were and are liable for cruelty and abuse, and they have been liable to duties, as is shown by the penalties to which they themselves were and are liable for offences against their masters or the State." But if this is all there is no distinction between an animal and a slave, for the master of an animal is liable to punishment for cruelty to it, and the animal is liable to be destroyed if it shows itself to be an objectionable member of society. "The term *thing* ought strictly to be limited to . . . physical substances, or detached portions of the material world." This is only the natural or popular description of a thing; the test of a juridical thing is, that it can be the object of rights and duties; hence a thing may be a juridical thing from one point of view and a juridical person from another

(as in the case of the Roman *hereditas*) and may be indivisible, immovable, &c., in law and not in nature. Passing to the analysis of right and duty we obtain the following definition of right: "a measure of control delegated by the supreme political authority of the State to persons said to be thereby invested with the right over the acts of other persons said to be thereby made liable to the performance of a duty." The expression "control" brings out the true nature of a right, whether negative or positive, but in his division of rights Professor Amos has omitted one important feature. Every right is a right *in rem*, a right *in personam* being a right *in rem* coupled with a right against a determinate person, and therefore it has two aspects—one, when the right is infringed by the person bound, the other when it is interfered with by a stranger. It is owing to this oversight that Professor Amos lays it down that "when a father or master brings an action for the detention of, or for injuries inflicted upon his child or apprentice, or when a husband sues for injuries inflicted upon his wife, the child, apprentice, and wife are in fact held to be *things*." The author justly remarks that "the action is not brought in pursuance of the legal rights of the child, apprentice or wife," but we cannot agree with him that "for the purposes of the action they might as well be criminals, slaves or beasts of burden," for the fact that they stand to the plaintiff in the relation of child, apprentice, or wife, is the very gist of the action; the reason why they do not appear personally in the case is that the injury is to the right of the father, &c., to have the benefit of the *servitium* or *consortium* of the child or wife; the injury to the child or wife must form the subject of a separate action. This analysis of "right" is explained with admirable clearness by Ortolan (*Généralisation du Droit Romain*, s. 190). We will not enter into the discussion as to the nature of intention, will, act, event, &c., beyond remarking that any muscular movement which is the direct result of the action of the brain on the nerves may properly be called an act, although the action may have been induced by moral

influence, involuntary cerebration, or disease. Professor Amos calls the latter kind of act an event; what is gained by this we are unable to conceive. After discussing intention, insanity, &c., the author tells us that "the most important cause of dislocated intention is that sort of wilful interference on the part of others which is styled *fraud*." So far as we are able to understand this and the passage on p. 115 about "mental alacrity prescribed by law" (compared with contradictory statements on pp. 15 and 375), we think them incorrect.

In the chapter on ownership we have too much about the moral and social influence of ownership (whatever that may be), and too little about its technical nature. Professor Amos hardly touches on the difference between the various restrictions on ownership. When the author descends to practical subjects there is a perceptible falling off in accuracy; thus the term "servitude" is treated as equivalent to "easement," the right of pasture is included among "easements," and the distinction between urban and rustic servitudes is asserted to be identical with that between negative and affirmative servitudes. "Easements and servitudes are in fact only species of joint proprietorship, having, however, this characteristic, that the person in whom the easement vests is denoted solely by the circumstance of his occupying, owning or residing upon some adjoining place." "The principle universally applied to ascertain the existence and extent of such exceptional rights (easements) is that of prior possession." We should like to see some authority for these positions. We may remark that Professor Amos's explanations of Roman law doctrines are seldom accurate; his account of *possessio ad interdicta* and *ad usucapionem* is an instance.

The chapter on contracts is on the whole well executed, although we must demur to Professor Amos's dictum that "the consideration is no part of the contract itself. It is only one of the facts, or classes of facts, from which the law judges that an actual contract has been made. It is in

truth a general formula deduced from the ordinary experience of mankind." If so, how can an immoral consideration invalidate a contract? The account of stoppage *in transitu* seems to us inaccurate, and both it and lien are out of place in a chapter on contracts; they belong to the class of extra-judicial secondary rights, a class which does not appear in the book at all. From his remarks on the phrase, "contract of sale" the author seems not to be aware that "sale" originally meant a contract to transfer property, and is so used at the present day in regard to conveyances of land. May we ask what is the meaning of the following passage (p. 219)?

"The case may be supposed that a sale has been made of the general kind recognised and supported by law, and yet that neither party has complied with the formalities (whatever they happen to be) which in every case are indispensable to the legal conveyance of the property or money. Here the law occupies a somewhat ambiguous position. On the one hand, it asserts that the parties have conveyed that which, by the appropriate act, they signified their purpose to convey; on the other hand, the law asserts they neither of them conveyed that which, without the forms appropriate in each case, could not be conveyed."

From what the author says about negotiable instruments and insurance we might infer that he never heard of a bill payable to bearer, or of an underwriter. In comparing the Roman *mandatum* with the contract of agency it should have been pointed out that the former was properly gratuitous: "*mandatum nisi gratuitum nullum est.*"

On the subject of Criminal Law, Procedure, Evidence, International Law, and Codification, Professor Amos is on safe ground, and this part of the book is satisfactory, although we notice occasional inaccuracies in matters of detail. "Hearsay evidence" is not equivalent to "derivative evidence," and the functions of the Courts of Bankruptcy, Probate and Divorce, are not of a "purely administrative character." On the subject of Codification (which is well explained) we venture to differ from the author as to the object of arrangement in a code; we cannot see that "professional and popular education," "the supplying in-

formation on the general structure of the whole law to legislators and to foreigners," or "the enabling each class of persons in the community to study thoroughly the portion of the law which peculiarly touches themselves," are within the purposes of a code: all these things can be done more appropriately—and better—by private authors.

We have to thank Professor Amos for sparing us from the capital letters with which his "Systematic View" is so liberally sprinkled; he would add still more to our obligations if he would cease from persistently employing eccentric and tautological expressions and using words in their wrong senses: "momentous facts," "bodiless phantom of law," "physical validity of business transactions," "ascending upwards and descending downwards," "aggregation and mutual repulsion of a number of independent and self-conscious atoms" [= men] are specimens. We need hardly observe that this use of unnecessary words only weakens the argument. "Fact" is a constant and irritating offender: it is used elastically for "institution," "idea," "condition," "relation," &c., and sometimes without any meaning at all; what is "the fact of ownership" or a "physical fact"? Marriage is spoken of as a status. Occasionally we soar into the region of poetry: "Man needs no longer the prompting and support of his fellows to think and act as he ought. In the most desolate wilderness, in the hour of shipwreck, in the lonely mountain top, he gives up his life for his fellows simply because he listens with keen attention to the voice of duty." The book concludes with the following roseate description of law:

"That which steadies him [man] and keeps him firm to his conscious or un-conscious purpose, protecting all men against the imperfection of each, and protecting each against the pressure of all—kind and yet unflinching, personating the past, the present, and the future—imperiously addressing all and yet whispering to each—is *law*."

We have pointed out the merits and defects of this work in some detail, because English jurisprudence is at the present moment in a critical position, and Professor Amos

is one of its few representatives. The revival of the study of Roman law and the increasing interest in the history of legal institutions are most welcome signs, giving ground for hope that jurisprudence will soon take its proper place in legal education. For this reason it is of extreme importance that jurisprudence should present its best face, and that jurists should give its opponents no opportunity of taunting it with being "unpractical" and "misty." Professor Amos's book has many good points, and it is entirely free from the admixture of theology which is unhappily so common in the works of foreign writers on the philosophy of law, but the preponderance in it of the ethical over the technical element, and the absence of scientific and logical precision, are not calculated to advance the claim of jurisprudence to be an exact science.

III.—ALTERNATIVE SCHEMES.

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THE question as to whether a Parliamentary Committee is a satisfactory court to deal with legislation which affects public interests and private rights, in connection with railways, gas, and water, has been somewhat garrulously discussed, and one objection, which is not without weight, has been urged against the determination of such questions by such a tribunal, and that is, that a Parliamentary Committee has not sufficient permanency. A court, like a man, to deal adequately with any question, must have a memory. But a court, the individual members of which are changed from week to week, is not in a position to retain or carry forward its traditions. A man without a memory is unable to profit by experience. A court without the elements of permanence and continuity is incapable of the accumulation of precedents or of the avoidance of errors in

the present by the wisdom which is earned through the errors of the past. This characteristic was illustrated on a recent occasion, when the Wakefield Water Bill came before a Committee of the House of Lords. In that case a question of importance and interest in connection with the admissibility of evidence was raised and argued; and as it appeared that no very definite rule had been laid down with regard to it, and as, although the question was raised, it was not decided, it may be well to consider the question in this place, and to endeavour to arrive at some satisfactory conclusions with reference to the principles which ought to regulate the admission of evidence in such cases. In the case alluded to, the Wakefield Water Company, which has from the year 1837 supplied the town of Wakefield with water taken from the river Calder, were the promoters of a scheme to make a reservoir at Langsett, by means of which they proposed to impound the waters of the Little Don, a tributary of the Don, the river which flows through Sheffield and Rotherham, and on to Doncaster. This scheme, which was, according to the promoters, rendered absolutely necessary by the disgusting state of the water of the Calder—which was described as a sewer for the sewage of half a million of people, and for the foul refuse of about 1,000 manufactories—by the impossibility of rendering its water at all fit for drinking purposes by any process short of distillation, and by the urgent want of water which existed in the district around Wakefield, which was occasioned by the abstraction of the water of most of the wells and springs by the mining operations which are going on in that district—was vigorously opposed by the Corporations of Sheffield, Rotherham, and Doncaster, by millowners on the rivers, and other persons who had an interest in keeping the waters which the promoters sought to impound and carry to Wakefield. One of the arguments used by the petitioners was founded upon the Report of the Royal Commission on Water Supply (1869). The Commissioners who made that report recommended that no town or district should be allowed to appropriate a source of supply which

naturally or geographically belongs to a town or district nearer to such source, unless under special circumstances it is justified in the appropriation.

On the ground, then, that the Little Don was not in the water-shed of the Calder, and was not, therefore, the natural source of supply for the town of Wakefield, the petitioners urged that the Bill should not become law, and, with a view of strengthening their case, they asserted that not only was the Wakefield Water Company contravening this recommendation of the Royal Commission by seeking to take the waters of the Little Don, but that it was seeking to appropriate the waters which naturally belonged to the towns in the valley of the Don, at the time when there were available sources of supply unappropriated in the valley of the Calder. When the Bill came before the Committee of the House of Commons, the petitioners, although they had asserted that there were available sources of supply in the valley of the Calder, had not pointed definitely to any such source, or described in what way such alleged supply could be procured, and on the ground that such a hint was much too vague to enable the promoters to meet any alternative scheme which might be founded upon it, the petitioners were, by order of the Committee, precluded from going into alternative schemes at all. This decision seemed founded upon a definite and rational principle. The way to get at the truth of any matter is to allow each party to state fully and fairly the facts upon which he relies. But the person who makes the complaint must give him who has to answer it a full knowledge of the circumstances on which the complaint is founded. It would be unfair to a defendant to compel him to appear in Court to answer to a vague charge of injury to the plaintiff. Were such the practice the defendant would in many cases come prepared to answer a charge, and with evidence to disprove an allegation which had not been preferred against him, and unprepared to disprove—however easy it might have been had he anticipated the charge—the precise allegation which he is there to

answer. Injustice would, under such circumstances, be inevitable. Now, it is upon similar principles that the promoters of any scheme are compelled to give the fullest description of their intentions in connection with the proposed works, in order that those who may be injuriously affected by the prosecution of the contemplated scheme may bring the facts of their grievance before the Committee. Were the scheme only vaguely described, many, who might in reality be seriously injured by it, would be unable to say in anticipation whether that would be the effect or not, and in that way many measures, which ought not to become law, might pass through Committee on account of a want of opposition, which might, to the minds of the Committee, seem to indicate acquiescence in the scheme, while it was in reality only an indication of the uncertainty and ignorance of those who would have been opponents had they been definitely assured as to the real scope of the measure, and its effects upon their rights and interests. Now if this is a correct rule in relation to the practice of those who promote Bills in Parliament, a similar principle must apply to the practice of those who oppose such measures. The best and most useful measure might be thrown out by some trivial but unexpected opposition. If the promoters have to give notice of their intentions it is only fair that opponents should be equally explicit in relation to their opposition. Thus if vague plans, indefinite specifications, and inexact estimates would place the opponents at a serious disadvantage, so vague allegations in the petitions would cause much inconvenience to those who had to prove their case. Ambush may be fair in war, which of its very nature is unjust, but it is inexpedient and improper in law, which of its nature is justice, and which aims at the attainment of truth. Strategic defences are to be guarded against by every rule of practice. It is upon these grounds, then, that we say the vague allegation of the existence of available sources of water supply for Wakefield within the valley of the Calder, was properly held by the Committee of the Com-

mons, to be inadequate as a foundation for evidence that it was procurable from any particular source, and that such evidence was very properly held to be inadmissible. If the petitioners had upon such a hint been allowed to give evidence of the existence of a source of water supply somewhere in the Calder Valley, the promoters' bill might have been thrown out on such proof, although they would, had due notice been given, have been in a position to prove that the supposed source was not available for the supply of Wakefield. We do not say that that was so, but it certainly might have been so, and there can be no doubt, it seems to us, that the rule which excludes all evidence of alternative schemes, unless they have been clearly and specifically set out in the petition, is an excellent one. But here we have to deal with the other question, namely, whether, when the alternative scheme had been definitely referred to and described in the petitions, evidence in support of such scheme, as showing that it is better than that of the promoters, is or is not admissible. That was the point which was raised before the Committee of the House of Lords on this Bill. The Bill having passed the Commons, the opponents again appeared in the Lords, and most of the petitions described two schemes by which water could be procured for the supply of Wakefield, without having recourse to the Little Don. One of these was a pumping scheme which alleged the possibility of getting an inexhaustible supply of water of a good quality from the Red Sandstone at Hock, near Snaith; the other was a gravitation scheme which proposed to impound, by means of three reservoirs, the water of the Crimsworth Dean which is a tributary of the Calder, above Halifax. In opening the case for the promoters, counsel said that he did not propose to touch upon the alternative schemes until the end of his speech, and that before doing so at all he would ask the Committee to decide whether the petitioners were entitled to set up an alternative scheme, which was, he submitted, contrary to the practice of

Parliament. Thereupon a most curious discussion arose, several counsel maintaining that evidence of alternative schemes was not contrary to the practice of Parliament. Several precedents were quoted, in which it was asserted that proof of alternative schemes had been allowed; and, on the other side, counsel for the promoters confidently assured the Committee that in these very cases such proof had been held inadmissible. Each side attempted to establish the truth of its assertions by confident reiteration, and by laying before the chairman volumes containing the printed evidence taken before various committees, from which, it was said, no other inference could be drawn than that which the party speaking had asserted to be the universal practice of Parliament. One counsel, informing the Committee that he would bring under their notice the most recent precedent, told them what he had advised his clients that very morning in a Railway Bill which was at that instant before another committee. It was scarcely to be expected that much would result from this discussion. The Committee took time to consider its decision, and the chairman in the interval consulted Lords Redesdale, Chelmsford, and Selborne, and the next day he informed the parties that the Committee, understanding that the admission or exclusion of such evidences was a matter entirely for their discretion, had come to the conclusion that, in the meantime at least, they would exclude all evidence of alternative schemes, but would hold themselves free to admit evidence upon these schemes at a subsequent point in the case, if they thought it expedient to do so. This decision did not, however, put an end to a good deal of diffuse and miscellaneous argument, in the course of which it appeared that the promoters of the Bill had received definite information as to these alternative schemes from the opponents only a few days before the petitions were lodged, and the Committee, when it was informed of that fact, came to the conclusion that, without giving any decision on the question as to whether it was or was not the practice of Parliament to

allow or refuse evidence of alternative schemes, they were of opinion that, in the case before them, sufficient notice had not been given to the promoters, and that upon that ground they would hold all evidence as to these alternative schemes inadmissible. In this way no decision was given on the point, and as it seems of importance that some definite rule should be laid down with reference to this matter, and it is a subject of surprise that some rule was not long ago enunciated with reference to it, we have undertaken to write this essay towards a rational conclusion with reference to this point of practice.

It seemed to be admitted, in the discussion to which we have referred, that where a Railway Bill was before the House, the scheme of which was to make a line of communication from A to B, through certain places, say C and D, any proof that an entirely other line between the two termini, by way of places E and F, was more expedient, would be inadmissible, but that it was competent to the opponents of such Bill to prove that in the line A C D B, a deviation by C' and D' would be of more public utility than the proposed line, would be cheaper of construction, or some other circumstances which would justify the Committee in coming to the conclusion that the line A C D B was not such an one as Parliament should sanction.* But although such a rule seems to admit the possibility of proof of an alternative scheme in matters of detail, although not in the entire scope of the measure; it must be remembered that Bills which have to do with the supply of water are very different from those which are introduced with a view to the making of a means of conveyance. Water is a necessity, railway communication is an advantage. The claim of a town or an individual to a railway is very much like the claim of a town or an individual to a water supply, not for domestic use, but for the purposes of manufacture. Both will be of service to the individual or town, but neither is

* See argument of Mr. Rodwell, p. 89, of the Minutes of Proceedings, in re Wakefield Water Bill. June 28rd, 1874.

absolutely necessary to the continuance of life or of sanitary conditions. But, again, another point in connection with this matter is definitely settled, and that is that in opposing a Water Bill it is quite competent to the petitioners to show that the water, which is at present supplied by the promoting Company, or Corporation, is sufficiently good. Further, if it can be shown that the water derived from the present source of supply, although not in a satisfactory condition for the purposes of domestic use, could, by the exercise of more care and caution, or by the use of any easily adopted process, such as filtration, be made a proper water for town supply, then that would be a good ground for the rejection of a Bill which sought to impound water at a distance and bring it to the town which has already an adequate supply. Parliament must, in all such cases, bear in mind that water is the common property of the whole community, and as such it must always be used with caution and economy. Although Parliament would do wrong in all cases to prevent water being taken for a town supply from a distance, and is right in many cases in sanctioning immense expenditure in the conveyance of hill waters into the centres of population and industry, yet Parliament ought to remember that every such expense has to be paid by the community, and that unnecessary undertakings are a means of preventing the successful promotion of absolutely necessary schemes; and to remember, further, that the waters which are, perhaps, not wanted in the hills just now, may, by the growth of large towns, and the increase of populations in the valleys, be required in time to come, and that these towns may, in time, have good reason to complain if Parliament has given over to towns, at a distance, which did not require them, the waters of these hills. Hence it is of very great importance that Parliament should have an opportunity of judging of the adequacy of the present supply of any town or company which may desire to impound water at a distance from it. This, in some aspects, resembles the proof of an alternative scheme. But we can carry this matter further. In the

case to which we have referred, evidence which went to show that the promoting company, which was to be presumed to have made up its mind to go to the Little Don because there were no available sources of supply to be had nearer to Wakefield (and that was, of course, the clear inference, after the exclusion of the alternative schemes), had not made proper and adequate inquiry and examination of the district in the immediate vicinity to enable it to come to any correct conclusion as to the impossibility of getting water much nearer than the proposed source. Now this certainly does seem a relevant and proper inquiry. If a company—mistaking its interests, which are in the end to be best served by a careful regard to public interest, endeavours to procure water from a distant source—with the view it may be of preventing the competition of another town in some branch of trade for which a certain quality of water is required—if, we say, it can be shown that that company is neglecting a source of supply which can be procured with much less difficulty, and at much less expense, in its immediate neighbourhood, would not such proof be a ground for refusing the company the powers it seeks, and can any just and proper conclusion be arrived at by any committee who rejects all evidence of this fact? Without the circumstance that water can be procured at less cost from another source, without proof that the difficulties to be encountered either in the way of engineering, or of the opposition of those whose rights were affected by the measure, the scheme proposed ought to become law if the necessity for a new supply is established; with proof of these circumstances, the scheme proposed ought to be rejected, and the company compelled to have recourse to its more legitimate sources of supply. All this is in favour of the admission of evidence of alternative schemes. But there is a good deal to be said on the other side. All questions of evidence are to be determined with reference to the best method of arriving at true conclusions, and in relation to alternative schemes it may be said that a committee never would have the means of judging of the

excellence of these, while they would have ample means of arriving at a conclusion as to the defects of the scheme of the promoters. In the latter, plans are deposited long before the case comes on for hearing, in the former the plans which would be put in in support of the alternative scheme would be hastily prepared and the opportunities given of discovering their merits or defects would necessarily be inadequate. Again, the promoters are responsible for their plans and descriptions, and, if the Bill passes into law, have to carry the scheme in the way described to the Committee; the opponents, on the other hand, have no responsibility in connection with the scheme they propose in substitution for that of the promoters, and should they be successful in throwing out the Bill, the practicability of their alternative scheme will not have to be tested by them. It is always difficult to lay out a scheme which you have to carry out into act; it is always easy to make a suggestion, the difficulties of which you will not have to encounter. Again, there is another element which is apt to conduce to a false impression on the minds of the Committee. The promoters of a Bill have to give notice of their intention to introduce the Bill to all the persons whose rights are likely to be affected by its operation. This notice allows those who object to the measure to come forward and oppose it, and in many cases this opposition is most formidable and tends to the elucidation of the true facts of the case, and enables the Committee to arrive at a just conclusion. In case, however, the opponents of a Bill propose an alternative scheme, and, say, instead of impounding the waters of river Y, you ought to impound the waters of river Z, the Committee, while it has the means of arriving at a definite idea of the opposition of those persons who are affected by the Y scheme, as they appear by petition, has no means of forming any idea of the opposition which might be forthcoming if the Z scheme came in a substantive form before Parliament. Millowners, landowners &c., it may be said, will not appear against the mere suggestions in petitions,

and it is only when the alternative scheme is brought before Parliament, in the form of a Bill, that they will trouble themselves about it. One other objection to the admission of alternative schemes. The proposal of alternative schemes would of course in every instance occasion considerable outlay to the promoters. They would have to examine the site of the reservoir or the pumping station, they would have to make themselves familiar with the proposed line of pipes, they would have to analyse the waters, and endeavour to discover the opposition which would be met with from millowners, landowners, and others in the event of their having adopted the proposed alternative scheme. They would, in fact, have at the same time to get up two cases, and the length of time which would be occupied by the inquiry before the committee would add largely to the expenses which they must incur. This argument is not without its weight, for it must be remembered that after all it is the consumers that pay for the proceedings in Parliament as well as for the reservoirs and pipes. But, after giving all the weight to them which these objections deserve, we cannot but think that, under certain circumstances and under certain restrictions, evidence of alternative schemes should be admitted. First, it may be well to consider the objections. As to the disadvantage which the promoters would be under in relation to the fact that their plans had been long deposited, and ample opportunity given for the discovery of their defects, while no such disadvantage would tell against the plans of the opponents, little need be said. In each case where an alternative scheme was to be set up, due notice ought to be given to the promoters of the Bill, and the question of what is due notice in any case would be determined in relation to the length of time which the promoters might reasonably require to go over the ground, examine the scheme, and get up their case. On this matter the decision of Lord Aberdare's Committee in the Wakefield Water Case is in point. Again, the plans and specifications which would require to be given to the

promoters, along with the petitioners' intention to set up an alternative scheme, must be so definite and precise as to enable the promoters to understand the scheme, and any vague description or insufficient specification would, as we have seen in the discussion of another point of practice, be held insufficient to let in evidence which the petitioners are anxious to produce. As to the responsibility of the promoters for their scheme and the responsibility of the opponents for theirs, the fact would weigh as much for the promoters as against them. The fact that the promoters had done everything with a view to carrying it out practically, while the alternative scheme of the opponents was only an argumentative suggestion, that actual practicability was a requisite of the former, while mere speciousness was all that was necessary to the latter, would always be stated in argument, and would weigh with the minds of the committee perhaps more than it ought to, for, as a fact, if the scheme was practically futile, the engineers for the promoters would very quickly discover it, and very readily show in what way the scheme was defective. Again, as to the opposition which appears on a Bill, but which does not appear on an alternative scheme, the same remark might be made. It would always be a matter for argument, and might, in that form, tell more in favour of the promoters than it ought to do. If the alternative scheme proposed by the opponents of the Bill would really materially affect the interest of millowners, landowners, and others, the promoters will have no difficulty in procuring abundance of evidence of the strenuous opposition which would meet any effort to take the water which the alternative scheme suggests, and the more so that all those who would be interested in opposing the Bill for that purpose would willingly give evidence against the alternative scheme, seeing that, under these circumstances they would be doing much to maintain an effective opposition to the measure which might deprive them of the water which was of value to them, or invade other rights which they de-

sired should be let alone, and would be doing so, not at their own expense, but at the expense of the promoters of the Bill, in opposition to whom the alternative scheme had been proposed.

As to the expense which would be involved in the inquiry into alternative schemes, a word or two is necessary. A thorough inquiry before a competent tribunal is not a waste but an economy. It is better that a case should require one or two days more for investigation than that a community should have to suffer from hasty and ill-devised private laws. Besides, in regard to the expense, a useful limitation should, it seems to us, in all cases be made. Petitioners have been in the habit of suggesting a great many alternative schemes, and in that way forcing the promoters of a Bill to get up half a dozen cases. In the Wakefield case, to which we have repeatedly referred, two alternative schemes were set forth by most of the petitioners. In the Midlothian case, which was more than once referred to in the argument, it appeared that four alternative schemes had been suggested by the opponents to the Bill. Now it seems to us that, although it is expedient in most cases to admit proof as to alternative schemes, it might be well to limit the petitioners to one scheme. If there are four schemes, each one of which is better than that which is proposed by the promoters, then it is certain that the best of the four must be so superior that there could be little objection to resting the case of the opponents upon that one. Besides, it is unfair to the promoters to allow a multiplicity of schemes, for the multiplicity of schemes is exactly equivalent to the vagueness which we have already shown is a ground for excluding all evidence whatever. Fifty schemes set out with the utmost definiteness of resources are quite as difficult to deal with as a possible scheme vaguely hinted at. It seems to us, then, that it would be fair, in all cases, to limit the petitioners to one alternative scheme, although that alternative scheme might be allowed to include two sources of supply, if it appeared that one of the proposed sources was insuffi-

cient for the proposed limits of supply. We cannot see that this would in any way prove prejudicial to the opponents of a Bill, and we do see that it would be a useful check upon the promoters of measures which have for their end private aggrandisement rather than public interest. Under the circumstances above described, and with the restrictions referred to, we think it most expedient to admit evidence of alternative schemes. We think that such a rule of evidence, if once thoroughly understood in connection with Parliamentary practice, would be of the utmost service, and we cannot imagine any system more dangerous or more costly than that whereby a question, which ought to be definitely settled by a well understood rule of practice, is left to the discretion of the Committee.

If this essay contributes directly or indirectly to a satisfactory solution of this important question, it will have fulfilled a part of the object we had in view. There are other questions in connection with Parliamentary practice which, if opportunity offers, we will discuss hereafter.

IV.—CRIME AND PUNISHMENT.

OUGHT the end of punishment to be retribution on the offender, or the protection of the community? If punishment is inflicted as retribution on the offender, it is because of the moral heinousness of his crime; if inflicted for the protection of the community, it is to prevent crimes of the same class as that committed, and its immediate object is to deter the criminal class from committing offences similar to that which is punished. If the latter view be acted on; or if, in the words of a celebrated judge, the criminal is punished, "not because he stole the horse, but that horses may not be stolen," we may conceive the criminal saying, "If the punishment is for my

bad conduct, I am ready to submit to it; but if you punish me, not because I have done it, nor even because other people have done it, but because other people *may* do it, and in order to prevent them, you act unjustly in punishing me for other people's possible crimes." The answer would be, "The relation of the judge is, not towards you, to award your deserts, but, towards the community, to protect it from evil; and you are only treated as one of the symptoms of an evil. The physician's province is to remove the fever that causes the bad symptoms, and the spots only concern him, so far as they indicate the fever that disturbs the system. Your act, in stealing the horse, is only one of the symptoms of the horse-stealing fever that disturbs the body politic, and the legislator's duty is to remove that fever, without concerning himself whether one of the symptoms thinks it has been fairly treated.

Such are the alternatives raised. We will now consider the position, that punishment ought to be retribution on the criminal.

The judge is the servant of the legislature, and the legislature is the authorized agent of the community: *a fortiori*, it is the authorized agent of that particular member of the community who has been injured. The act of the authorized agent is the act of the principal, for "*Qui facit per alium facit per se*." If, therefore, the judge is morally justified in inflicting retribution, so, in like manner, is the aggrieved person; and it makes no difference in point of morality that, for the sake of convenience, he has authorized the judge to act on his behalf.

Is, then, the punishment of our enemies justifiable morally? The opinion of the Grecian philosophers, 350 years before the Christian era, may be gathered from the "Republic of Plato," Book I, chapters 8 and 9; Socrates being represented as having conversations with a friend in which he puts the questions, and his friend answers them. After discussing and disposing of the question, whether it is just to restore to each his due, it is asked, "Is it the just man's part, then, to hurt any

mortal whatever?" The reply is, "By all means; the wicked, at least, and his enemies he ought certainly to injure." Socrates combats the position, and concludes in the following terms: "Neither, then, is it the part of the just man to hurt either friend, or any other; but that is the part of the contrary, the unjust man. If, then, any one affirms it just to give every one his due, and consequently thinks this within himself, that injury is due from a just man to his enemies but service to his friends, he spoke not the truth, for in no case has been proved the justice of injuring any one at all."

From the above quotation, therefore, it must be admitted that, in the opinion of the greatest moral philosophers prior to the Christian era, to suffer evil was no ground of justification for inflicting it.

The Scriptures carry the duty of forgiveness still further. Thus, "Ye have heard it hath been said: Thou shalt love thy neighbour and hate thine enemy, but I say unto you love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you and persecute you."

Is there, then, to be no punishment for criminals? Certainly not, on the ground of retribution; and we must look elsewhere for a principle on which to base it.

It is obvious that society could not hold together if crime was not restrained. The ground, therefore, on which crime is punished, is self-defence. Society leaves criminals alone so far as concerns their inward motives, and only interferes with their outward actions when they cause it inconvenience. The relation, therefore, of the legislature is, towards the community, to prevent crime, rather than towards the criminal, to punish crime. It does not punish actions because they are morally wrong, but because they are inexpedient—not because of the evil of the criminal's moral character, but because of the evil effects of similar actions on the community. Observe, that it is not the evil of the criminal's act that the law must guard against; that particular evil is

already done, and its repetition by the criminal is a small matter, as compared with the perpetration of similar evils by men disposed to commit them. The direct object, therefore, must be to influence, not merely the criminal, but the class to which he belongs, and the punishment must be of such a nature as to deter that class from committing crimes of a sort similar to that which is dealt with.

Again, the same course of reasoning applies to the community, who are liable to suffer the evil, as to the criminal class, who are disposed to inflict it. It is not merely the alarm, felt by the individual victim, that must be removed; but the alarm felt by the community. And this is an admitted ground for giving greater punishment in cases in which the alarm is wide-spread, and felt by a large number of persons as an evil likely to befall them, than in those cases in which the alarm is confined to a limited class. The legislature cannot legislate for each individual in detail, but must act for the general good.

But, it may be asked, "Is not the effect of actions as producing happiness or misery to the community the exact measure of their moral character, and the only test of their heinousness?" If this question were answered in the affirmative, the present inquiry would be fruitless; if, in the negative, it would prove our contention that right and expediency are distinct exceptions. But this involves the larger question which arose with the dawn of philosophy, and is still pending, whether there exist in the mind, intuitions that are developed and brought into fruitful action by the education that comes to it from without; or, whether, on the other hand, all our conceptions are derived from experience and observation alone? On the one hand, it is contended that the mind intuitively conceives that every effect must *necessarily* have a cause. On the other hand, that we only know this so far as our experience goes, and that we have not the data for assuming that this *must* be so in the nature of things. On the one hand, that the three interior angles of a triangle must necessarily be equal to

two right angles. On the other, that our limited experience cannot decide dogmatically that it must be so, and that we cannot assume that, under different conditions to our own, they may not be equal to three right angles. On the one hand, it is contended that in the same way as the seed is the vital principle of the oak, and the conditions or occasions of its development are the soil, the rain, the air, and the sun, so the intuitions of the mind are developed by knowledge from without, the occasion of their active exercise. On the other, that everything the mind receives is from without, and that there is no intuition within.

The ethical branch of this controversy is, whether, on the one hand, we have the innate faculty of conscience that decides intuitively whether an action is right or wrong; or, whether, on the other hand, we must go out of ourselves to find a reason for its moral character, and can only decide that it is right or wrong, according to its effects, in causing happiness or misery, as being the only reasons for deciding whether it is right, or wrong? To this latter hypothesis there are, we think, insuperable objections.

In the first place, the happiness or misery of the next world are left altogether out of the calculation. According to the utilitarian theory, virtue is that which, on the whole, produces the greatest amount of happiness, that is to say, in this world; for the utilitarians cannot go beyond this world, inasmuch as they deny intuitions, and limit our knowledge to observation, and experience.

In the next place, the theory is, that hanging a man causes him pain or misery, and it is, therefore, in itself, and on that ground, morally wrong; but, that if he is hanged for the good of the community, it is therefore, and on that ground, morally right; in other words, we ought to do evil that good may come. We need not enlarge upon the effect of such a principle, or say more on this head to demonstrate that a theory leading to such a result must be incorrect.

We may further observe that if a criminal is punished because of the evil effects of his actions, and those evil

effects are also the exact measure of his moral heinousness, then if he has been sufficiently punished for the act by man, the necessary corollary is that he ought not in this world, or in the next, to be any further punished for the act by God; and, if not sufficiently punished by man, then, in this world, or the next, God is justified in making up the balance of punishment deserved. This would be compelling God to regulate his actions by those of man, which is a blasphemous and absurd conclusion; therefore, the theory must be false from which such a conclusion is deduced.

Having, as we trust, shown that the heinousness of an action means one thing, and its effects on the happiness of the community another, and that the ground of punishment is the protection of the community, and not retribution on the offender, we proceed to show that the position we support is in accordance with the practice of legislators.

Offences against the moral law are sins; offences against human, or positive law, are crimes. Some, but not all, sins are crimes; but, as crimes, they are looked at from a different point of view. As sins, they are matters of individual guilt; as crimes, they are acts producing evil effects on the security of society. Sins that do not produce alarm on the victim of them are not looked at as crimes, as they do not interfere with the feeling of security. Hence the distinction between seduction and rape. Seduction is the greater sin, as it pollutes the soul of the victim, which is infinitely more precious than the body. But here the legal principle applies, '*Volenti non fit injuria*,' and, as there is consent, and the absence of alarm, it is no crime. Rape, on the contrary, is an outrage in respect of which the alarm extends to every woman in the community. Hence the severity with which it is punished in all civilized countries. Again, as between two similar crimes, one is more severely punished than the other, because of the greater difficulty of detection—a ground clearly unjust, if they were punished in proportion to their heinousness. Hence, on the authority of Blackstone, in the Island of Man this rule was formerly car-

ried so far, that to take away an ox, or an ass, was there no felony, but a trespass, because of the difficulty in that little territory of concealing them, or carrying them off; but to steal a pig, or a fowl, which is easily done, was a capital crime, and the offender was punished with death.

On the same principle, according to our law, the crime of stealing a handkerchief from the person is punishable with greater severity than the crime of carrying off a load of corn from an open field, though the corn is of fifty times greater value than the handkerchief.

Again, acts not heinous at all become great crimes under certain conditions. From a military point of view, a sentry sleeping at his post commits a crime of the deepest dye, simply because of its dangerous and alarming consequences. A clerk sleeping over his desk would probably have much less excuse, having had no forced marches to make for his master, but to make it a crime would be absurd.

We have now submitted the view that both in theory and practice the end of punishment is not retribution on the offender, but the protection of the community; and that in practice this is illustrated. Firstly, by the punishment of some sins, because of the alarm they create, and the absence of punishment of other sins because they do not create alarm. Secondly, as between two similar crimes, by the greater punishment given for that which is the more difficult of detection; and, thirdly, by the punishment, because of their danger, of crimes having no moral heinousness at all. But it may be asked, "Cannot we combine the two ends of retribution and protection? Punish the offender because he deserves it, and at the same time, and by the same means, protect the community?" The reply, is that this is impracticable, and by attempting it we should fall between two stools. For, independently of the argument that there is no moral justification for inflicting retribution, the effect of adopting both alternatives would be immaterial if, upon one or the other, the same measure of punishment might be awarded. But the moment the standards diverge, diffi-

culties arise. Taking our former example, the crime of the sentry sleeping at his post, has no heinousness, yet its danger is extreme, and, though the punishment be severe, we must, for the sake of the argument, assume that, though severe, it is not more so than is absolutely necessary, by way of example, to ward off the danger that would arise, from a repetition of the offence. If, then, both standards are adopted, he is both wrongly and rightly punished; wrongly, because his offence was not heinous; rightly, because it was dangerous. He suffers both injustice and justice. And, if his punishment is mitigated, because his offence is not heinous, then injustice is done to the community, and the army of the community, by an insufficient remedy for the danger of the offence.

The reformation of the offender does not come within the scope of this paper, which is concerned with one only of the means used to protect the community from evil, namely, punishment; but, as it is so closely connected with the present subject, we refer to it.

It may be asked, then, whether reformation of the criminal should not be a subject for criminal jurisprudence. It might, as a means to an end; but not as an end in itself. If the criminal is reformed, so much the better. But care should be taken lest lenity of treatment cause the criminal class to be indifferent to punishment, and cause thereby an increase of evil to the community. Apart from legislative action, it is to the minister of religion that the reformation of the criminal is an end in itself. To the legislator, it is only a means to an end. It is satisfactory, however, to observe that, according to recent accounts, the experiment of reforming criminals by training them to labour is successful; and it is certainly the most satisfactory method, if kept in due subordination to the true end of criminal jurisprudence—the protection of the community.

It must be borne in mind that, though it has been said that some sins are crimes, the expression is not strictly correct, but has been used to avoid circumlocution. An

assassin stabs a man, and runs away. A surgeon arrives just in time to save his life, by stopping the effusion of blood. From a medical point of view, it is an interesting case. From a moral point of view, the assassin has committed a sin, and his punishment is in the hands of God. From a legal point of view, he has committed a crime; for the effect of the act is injurious to society, and the injury must be remedied by punishment of the assassin, as a means to the end of removing the cause of injury, or by such other means as the legislator may deem expedient.

Subject to the above explanation, it will appear, from the preceding examples, that, inasmuch as only some sins are crimes, so also there are crimes that are not sins. In fact, morals and jurisprudence view actions from totally different standpoints, and have no more to do with each other, directly, than they have to do with the science of medicine. The province of morals is the consciences and motives of *individuals*; and the moral principles that should guide them *individually*. That of Jurisprudence, civil as well as criminal, is the effect of *classes* of actions on the collective interests of *society*, and the expedients or means whereby those interests may be best protected. The one science is concerned with motives and intentions, *directly*; and only *indirectly* with actions arising therefrom, as indicating motives and intentions. The other science is concerned with actions, *directly*, as affecting society; and only *indirectly* with motives and intentions, as indicating the tendency of acts, according to their effects on the well-being of the community.

In close connection with this branch of the subject, is the old distinction between *mala in se*, and *mala prohibita*, the unsoundness of which, from a juridical point of view, has been demonstrated by Bentham, Austin, and other jurists. These terms coincide with the above distinction between crimes that are sins, and crimes that are not sins. *Mala in se*, therefore, ought, from a juridical point of view, to be considered simply with reference to their evil effects on society, which is the only ground for *mala prohibita*. Consequently,

the distinction between *mala in se*, and *mala prohibita*, if rightly conceived, is unmeaning; and, if wrongly, causes confusion between the sciences of ethics and jurisprudence.

We are aware that ethical writers of celebrity, both of the intuitive, and of the objective or utilitarian schools, have started with the proposition, that jurisprudence is a branch of ethics, and that the two sciences are concentric circles, of which ethics is the outer, and jurisprudence the inner circles, jurisprudence being that portion of ethics which it is expedient to regulate by legislative enactments; but the consequence of viewing jurisprudence as a branch of ethics would be, that legislators should either punish actions, according to their moral heinousness, as indicated by the dictates of conscience, on the same ground as they judge of the moral character of individuals, or, if they deny intuitions, then, that they should punish actions because of their evil effects on society, but only as a consequence of the assumption that the sole standard and test of morals is, in like manner, the effect of actions on society. But as the whole of our argument is based on the position that principle, as indicated by conscience, is the guide of morals; and expediency, as indicated by the effects of actions, the guide of jurisprudence, it is essential that we should not allow to pass unchallenged, the very general assumption, that jurisprudence is a branch of ethics.

In opposition to this assumption, we find, in authors of celebrity, passages substantially supporting the view we have endeavoured to demonstrate. Thus, in Montesquieu's "Esprit de Lois," vol. II. c. 9, it is said that "The laws of religion have a greater sublimity; the civil laws, a greater extent. Venerable as those ideas are which immediately spring from religion, they ought not always to serve as a first principle to the civil laws, because these have another, the general welfare of society."

Again, Dr. Brown, who was professor of Moral Philosophy at the University of Edinburgh, supports the view that we have intuitions of right and wrong; after criticising the

opposing utilitarian systems, says :—" I may remark, by the way, as a circumstance which has probably contributed, in a great degree, to this misconception of the immediate object of moral approbation, that in cases of political legislation, the very end of which is not to look to the present only, but to the future, we estimate the propriety of certain measures by their usefulness. That which is to be injurious we do not enact; and those who contend that we should enact it, think it necessary to show that it will be for the general advantage. Expediency being thus the circumstance on which the debates as to the propriety or impropriety of public measures in almost every case depend, we learn to consider it, very falsely, as the measure of our moral approbation, in the particular cases that are constantly occurring in domestic life. We forget that the legislator is appointed for the express purpose of consulting the general good, and of looking to the future, therefore, and distant, as well as to the present, or the near. His object is to see '*ne quid detrimenti respublica capiat.*' His relation is to the *community*, not to any *particular individual.*"

The above extract is clearly inconsistent with the assumption that jurisprudence is a branch of ethics; and as no moral philosopher stands higher than Dr. Brown in powers of analysis, we can, when backed by his high authority, maintain with greater confidence that the two sciences are essentially distinct.

Assuming that the distinction submitted between ethics and jurisprudence is a correct one, it affords an easy solution of the difficulties in which Governments have placed themselves, both in former and in recent times, when they have gone beyond their proper sphere. Moral principle, the province of morals, admits of no compromise. General expediency, the province of jurisprudence, is essentially a compromise of individual opinions and interests for the general good. Consequently, the attempt to legislate on matters of principle is invariably met by stubborn resistance on the one hand, and (if the Government have the power) by

persecution on the other. And, whether we contemplate the resistance, and consequent religious persecutions of former periods ; or, the resistance of the present day to taxation for the support of institutions having, in them elements to which large sections of the community have conscientious objections, the cause of the evil is the attempt to subject matters of principle that do not admit of compromise, to legislative control ; or, in other words, to a system of compromise and general expediency.

It has not been possible to do justice to this question within the limits of our present article, and we have gone over a wider field than at first sight might appear necessary, though, with one brief exception, we have carefully avoided anything that did not form a necessary link in our argument. After stating our reasons for adopting one of the hypotheses laid down, it was necessary that we should shew that each of them did not virtually represent the other, in which case comparison between them would have been fruitless, and this could not be satisfactorily explained without touching on conflicting ethical systems. Theoretically, then, we come to the conclusion that the end of punishment is the protection of the community. But the best test of any theory is its practical working, and therefore, we have shewn that legislators adopt the principle we support : firstly, by their selection of some sins only for punishment with reference to their disturbance of the peace of society ; secondly, by their apportionments of punishment, as between two similar offences, in relation to their effects ; and, thirdly, by their punishment of offences having no heinous quality, but because of their dangerous consequences. We demonstrated also that it was impracticable to combine the two alternatives of retribution and protection. And though not strictly within the scope of this article, we have concluded this branch of the subject by a brief remark on the relation between criminal jurisprudence, and the reformation of the criminal.

Inasmuch as the ground of punishment as retribution for an *individual* offence would be its moral heinousness, which

is a question of ethics; and our argument was that its evil effects on the community was a different conception from its moral character, and that the only ground of legal punishment was protection from *the class* of offences producing such evil effects, it was necessary that we should demonstrate that jurisprudence was a distinct science from ethics, and not a branch of it, as had been assumed by high authorities; and, in fact, as a matter of common sense, we are so familiar with the notion that matters of conscience are questions of principle, and matters of legislation questions of expediency, and that the Christian duty of forgiveness of injuries does not involve waiver of a right of action for breach of charter-party, or forgiveness of a criminal for burglary, that we should have taken the essential distinction between the two sciences as a matter of course, had it not been that a different view is frequently asserted.

The conclusions, therefore, at which we arrive may be summed up under the following heads:—

1. The end of punishment ought to be not retribution on the offender, but the protection of the community.

2. It is impracticable to combine retribution and protection.

3. The reformation of the criminal is a subject for criminal jurisprudence as a means of protecting the community, but not as an end in itself.

4. Ethics and jurisprudence are distinct sciences, the former being concerned with questions of principle affecting men's consciences and motives individually, and the latter with questions of expediency affecting their interests and actions collectively.

T. W. B.

V.—THE GAME LAWS CONSIDERED WITH REFERENCE TO THE PARLIAMENTARY REPORT OF 1873.

By EDWARD WEBSTER, Barrister-at-Law of the
Chancery Bar.

IN the year 1872 a Select Committee of the House of Commons was appointed to consider the game laws of the United Kingdom with a view to their amendment, and to inquire into the laws for the protection of deer in Scotland, and, in July, 1873, the Committee made its Report. The Committee had before it the unproductive report of a former Select Committee of the House of Commons, which sat in the Sessions of 1845-6, and it examined 74 witnesses, 26 of whom were tenant farmers—18 Scotch and 8 English. The Select Committee of 1872 was rendered necessary by the state of public feeling, which had, more especially in Scotland, become so inimical to the game laws, as to generate discontent with all land laws, and especially those regulating contracts between landlord and tenant. The evidence before the Select Committee presents to the public information of a most important character, proving that legislative interference with the present game laws is imperative; and, moreover, the evidence is of such a nature, that whatever laws may be substituted for the present game laws, it is predicted that the Legislature will be compelled to abandon the principle on which they are founded.

The Report, so far as it relates to deer, constitutes a subject distinct from the game laws, and, therefore, forms no part of the present article.

The pursuit and capture of wild animals was, when mankind were first placed on the earth, necessary for their sustenance, at least where nature did not present them with vegetable food ready to hand; and doubtless, therefore, that singular and wonderful animal, the dog—man's friend, guard and adorer—was, from the first, benignantly associated with

mankind, and invested with an instinctive love of hunting, that he might assist them in obtaining food. Hence field sports, especially when aided by dogs, form not only one of the greatest, but one of the most unobjectionable of pleasures. They are, moreover, in the highest degree conducive to health, and to the maintenance of that courage and manly spirit on which our national power depends. The Legislature should, in its policy, do nothing therefore to discourage field sports.

The principle of our present game laws is that of the Conquest, and although that principle has in its operation since been modified by the Legislature, it is still in character the same. There is no fiscal impediment to any person obtaining a license to kill game; but the moment he attempts to act upon the license, he will find himself surrounded by impediments. The legal theory is, indeed, that wild animals belong to nobody,* and yet the law, so far as regards those wild animals called game, invests certain favoured citizens with the exclusive right to pursue and capture them, by visiting all other citizens with penalties or punishment for pursuing or capturing them. This was not always so. By the Anglo-Saxon laws, each landowner had the exclusive right of chase over his own land.† This just principle was destroyed by the feudal laws established by the Conquest, whereby the right of chase was vested exclusively in the Crown and its Grantees, and most oppressively was it exercised; but as the history of the game laws is not an object of the present article, it is sufficient to observe, that whilst by the 1st and 2nd of William the 4th, c. 32, the feudal principle was ostensibly abandoned by conferring on every person a right to a game certificate, and by repealing twenty-seven former Acts recognising the feudal principle,‡

* Law Magazine, No. lx., p. 180.

† The Anglo-Saxon Game Laws, are well stated in a Pamphlet on the Game Laws, by Mr G. Shaw-Lefevre, M.P., 1874, p. 1.

‡ By an Act passed in 1389, 13 Richard 2nd, none were allowed to hunt but those that had sufficient living; and in 1540, 32 Henry 8th, c. 8, the sale of pheasants and partridges was forbidden to all except the Royal Household; and in 1670, 22 & 23 Charles 2nd, the Qualification to Kill Game Act was passed.

it virtually retained it, by giving power to landlords to preserve the game and the exclusive right of sporting. In truth, for all practical and social purposes, the exclusive right to pursue and capture game is now almost invariably vested in landlords to the exclusion of all other persons, including their tenants.

By the common law, as already observed, wild animals have no owner. There is, therefore, no moral offence in killing them; on the contrary, there is a natural right to kill them, as has been shown, and the game laws are Acts of Parliament restricting that natural right. They create, therefore, a statutory offence.

The animals called game are defined by statute to be hares, pheasants, partridges, heath or moor game, black game, and bustards, but rabbits and various land and water birds, though not game, are protected by Statute Law.

Land in a wild state does not produce any cereal or root crop, nor any grass except the natural grasses. It consists of rocks, mountains, forests, heaths, swamps, and grass land, and is capable of sustaining comparatively few inhabitants and few wild animals. Such was, in Anglo-Saxon times, the condition generally of the United Kingdom; but by the expenditure of skill, labour, and capital, the face of nature has been changed. Most persons have observed how varied in shape, how unequal in acreage, are the inclosures of land in this kingdom. This proves that wild land has been from time to time rescued from a state of nature by private proceedings, under which the cultivators obtained by law an exclusive right to the land reclaimed. A right more just cannot exist, for all property is founded upon the expenditure of capital upon an object whereby it is rendered more serviceable.* Landowners have, therefore, as sacred a right to cultivated land as a person to the clothes he has purchased. The United Kingdom being insular, a relation, which can have no existence where wild land is obtainable for cultivation, has been brought into existence, namely, that

* *Law Magazine*, No. LX., p. 181.

of landlord and tenant, and hence almost invariably in the United Kingdom the ownership of land is vested in those two persons. The capital of the landlord in the land consists of the homestead, the farm buildings, the timber, the fences, the minerals, and the drains. The capital of the tenant consists of his household furniture, live and dead farming stock, and growing crops. The pecuniary value of the capital of the landlord in the land is hence far greater than that of the tenant. It is certain, therefore, that all wild animals whose maintenance is derived from the farm produce of cultivated land, belong, upon principles of justice and political economy, as against all other persons, to those from whose capital that produce is brought into existence.

Animals by nature have one or the other of two dispositions, they have or have not the *animus revertendi*. Animals having that faculty are capable of being domesticated, and, strange to say, are so varied in colour, stature and breed, that each may be identified, whilst the other animals are so alike as to render distinction impossible. This fact was relied upon by perhaps the most able and reliable witness examined by the Select Committee as a reason for not making game property,* and by Mr. Arch to justify poaching.†

It appears by the evidence before the Select Committee,‡ that 55 per cent. of game poachers were convicted of other crimes, and that the large majority of them were convicted first of poaching. Nevertheless, the same witness states (1,034) that the Night Poaching Act has caused a diminution of the crimes of sheep stealing, poultry stealing, burglaries and various offences, including, it would seem, (1,033) deadly conflicts between poachers and keepers. Whether the Night Poaching Act should be repealed is, therefore, a very grave question.

In the Appendix to the Report of 1872, there is a

* Report 1873, p. 337.

† Sheriff Barclay, Report 1873, p. 194.

‡ Mr. J. Dunne, Chief Constable of Cumberland and Westmorland, Rep. 1872, p. 54.

tabular statement of the number of persons proceeded against summarily under the game laws from 1857 to 1871, from which the following is an extract confined to the interval between 1862 and 1871. 1862, 10,101; 1863, 9,638; 1864, 10,117; 1865, 10,392; 1866, 10,831; 1867, 11,436; 1868, 11,398; 1869, 12,291; 1870, 12,704; 1871, 10,773

It has already been stated that the exclusive right to game is practically, though not theoretically, for the most part vested in the landlord, and the law also recognizes in the landlord a right to alienate that exclusive right. Thence he has by law a power to obtain from his land two rents, an agricultural rent and a game rent, the latter destroying the sources of the former, to the extent to which game is preserved and appropriated by the landlord's alienee; but as an abstract proposition, the landlord may himself in like manner preserve and appropriate the game if he chooses so to do. There is much evidence taken by the Select Committee showing the great and irreparable damage occasioned to tenants by the over preservation of game.* Our tenant farmer stated that from 140 acres of arable land he obtained, before game was preserved, 592 quarters, and afterwards 339 quarters,† and it seems that loss from game cannot be made up by damages or a reduction of rent.‡ That is stated by a trained practical farmer, and other witnesses. The President of the Scottish Chamber of Agriculture, Mr. William Smith, gave most important evidence, stating § when speaking of game tenants, "I believe, as an agricultural tenant, that really the good feeling between the landlord and tenant is in that case torn up. I would say that the agricultural tenant looks upon that transaction as an immoral act on the part of the landlord." And surely it must be so, for it is contrary to good faith that a landlord should let a farm and then appropriate the tenant's produce to his own use, exacting at the same time the rent.

There is no respect for the game laws. "The working

* Rep. 1872, p. 108.

† Rep. 1872, p. 142.

‡ Rep. 1872, p. 210.

§ ib. 1872, p. 247.

classes consider," observes Sheriff Barclay, "I am sorry to say, offences against the game laws as no moral offence; their sympathy is all with the poacher."* Keepers kill their cats, hares and rabbits destroy their vegetables.† Since the right of search, under the Night Poaching Act, the game laws have become exceedingly unpopular.‡ The agricultural labourers consider that they injure labour, because, if a farmer, whose game is not preserved, gets, for example, 16 bags of wheat off ground, which, when eaten off by hares and rabbits, produces 10 bags only, he cannot afford to pay the labourer so well. The game laws are the great question with the agricultural labourer.||

Several witnesses—tenant farmers—allege that rabbits cost more than they sell for, and in the Appendix to Rep. 1872, p. 460, there is a calculation for Scotland of a curious nature. It is as follows:—

5 rabbits = 1 sheep	{ 720,000 rabbits, at 10d.	..	..	£37,000
	{ 144,000 sheep, at 40s.	..	..	288,000
Loss to Scotland by rabbits				£258,000
3 hares = 1 sheep	{ 109,000 hares, at 2s. 9d.	..	..	£15,000
	{ 30,363 sheep, at 40s.	..	..	72,721
Loss by rabbits				£258,000
Loss to Scotland by hares				57,726
Total loss to Scotland by rabbits and hares				£315,726

A Scotch tenant farmer, (Mr. W. Smith), of 500 acres, brought in that calculation. This witness says, p. 250, q. 6,296-7, that people in towns have an idea that the game laws curtail the supply of butchers meat, and that if they were abolished they would get mutton and beef 2d. or 3d. a pound cheaper. He says the people are good logicians, and if they see a turnip field a quarter eaten, they think it would have probably fed half a dozen other animals. Of course the value of Mr. Smith's calculation depends upon this, that the

* Sheriff Barclay, Rep. 1873, p. 195. Mr. Arch, *ib.* p. 321.

† Mr. Read, M.P., *ib.* p. 315. Mr. Arch, *ib.* p. 323.

‡ *ib.* p. 321

|| *ib.* p. 335 † *ib.* p. 336.

consumption of five rabbits is equal to one sheep. Now, from actual experiment, a sheep had in its stomach eight pounds weight of food, a wild rabbit two ounces; the average weight of one sheep with another, as mutton, may be regarded as 80 lbs.; a rabbit, ready for cooking, 40 ozs. If this be so, the cost of food in a rabbit is one half that of a sheep, and where three sheep would be brought to market, weighing 240 lbs., there would be 192 rabbits, weighing 480 lbs., and besides a rabbit breeds seven times a year, and comes to maturity in six months, a sheep once a year, and is at maturity in two years. The evidence before the Committee strongly preponderates in favour of hares and rabbits being brought to market at considerably less expense than beef and mutton. The farmers, who stated to the contrary, few of them had thought out the question, and most of them were justly irritated by their landlords over preserving. Mr. Peck, one of the witnesses, had about the end of November, 1872, turned out fifty wild rabbits on an acre and a half of enclosed land; nine died, the remainder bred, and he expected in September last, 500 rabbits for sale worth 1s. or 1s. 3d. each, besides breeding stock to go on with. The cost of these 500 rabbits, including rent, was £10 15s. 2d.* Another witness says it would be very profitable to have a farm, &c., and cultivate rabbits,† and another witness ‡ states—"I believe to breed and feed poultry, to breed wild rabbits, and to breed and rear pheasants, there is no profit equal to it." There are, it seems,|| about 1,360,000 rabbits imported into, and about 30,000,000 hares and rabbits produced, within the United Kingdom.§ The real value for wild rabbits for food is estimated at £1,725,000, and the poor prefer rabbit meat to butcher's meat, on account of its delicacy, and they get four pounds weight for 2s. 2d. The cost of the food of the wild rabbit

* Peck, 1873, p. 292, q. 7325; ditto, q. 11526, p. 451.

† Muirhead, 1873, p. 75, q. 2087.

‡ Brooke, 1873, p. 84, q. 2872.

§ Mr. Bailey, Rep., 1872, p. 114.

¶ Mr. S. Christy, Rep., 1873, p. 204.

has received no attention from the numerous witnesses who speak of them as injurious, as vermin, &c., and hares and rabbits, the Report finds, produce annually about 40,000 tons of food; and as regards the latter, it has been shown, consumed chiefly by the working classes. There was no evidence whatever before the Select Committee proving that if the working classes were deprived of rabbits for food, they would obtain a substitute in beef and mutton. The statements before the Committee on that question are no more than vague assertions. The working classes have, therefore, a paramount interest, not, indeed, in the present game laws, but in the preservation of all useful wild animals, the preservation of rabbits being essential to them; and the preservation of rabbits is inseparable from the preservation of other useful wild animals.

The abolition of the game laws without any substitute would be as injurious to farmers as are the game laws now existing. Rats and other vermin would not be destroyed by game keepers, and hence farmers would be put to additional expense to keep them down, for they would, and especially rats, which are most injurious to the farmers, swarm unless destroyed.

Trespass would be largely increased, for, under pretence of following wild animals, innumerable people would go on cultivated land, and an increase of police would be necessary, for if trespassers found no game other property would require greater protection.* Mr. John Jones, Chief Constable of Dumfriesshire, observes,† “I think if you were to abolish the game laws the tenants would be the very first to cry out that they should be put in the same state as they are at present.” Doubtless it would be so, for fences would be broken down, root crops stolen or damaged, gates left open so that cattle would stray, sheep disturbed when lambing and fattening. In short, if the multitude were allowed to go over cultivated land unrestrained, the law would be sanc-

* Report 1872, p. 48

† Report 1873, p. 4.

tioning a spirit of spoilation, inconsistent with the rights of property. Field sports would be no more. The intelligence and beautiful motions and manners of the dog when engaged in accord with his natural instincts, would be no longer enjoyable, nor the invigorating exercise and healthful pleasure of pursuing with him animals made to be killed by nature for his pleasure and food.

If the Report of the Select Committee were introduced into an Act of Parliament, its operation would be as follows:

Be it enacted, 1st. That all legal protection to rabbits be withdrawn except in warrens and inclosed places.

2nd. That the law of Scotland and England be assimilated so as in the absence of the right being reserved by the landlord, the right to game should vest in the tenant.

3rd. That damages to tenant by game shall be settled by arbitration.

4. That if questions be not settled out of court, jurisdiction to arbitrate be given to County Courts in England and to Sheriffs in Scotland.

5. That where a landlord lets the right of shooting, and the tenant proceeds against landlord for game damage, the lessee of the shooting shall be required to be the defendant.

6. That occupiers of game preserves shall be liable for damages done by ground game to adjoining proprietors.

7. That a poacher by day shall be regarded as a trespasser, and therefore no longer punishable criminally.

8. That a second trespass by day in persuit of game shall entitle the person injured to an order from the County Court inderdicting further trespass.

9. That a person entitled to game or rabbits may, with the occupier's consent, bring an action against a trespasser for damages.

10. That where game is reserved, the occupying tenant shall not be criminally liable for the destruction of game on his farm, except during close time or under excise licences.

11. That eggs of game be made property and the subject of larceny.

12. That night poaching, save where offenders are armed, and more than two, should confer a discretion on Magistrates to punish by fine or imprisonment. And that accumulative penalties be abolished with a right in the accused to be tried by a jury.

13. That accumulative penalties be abolished.

14. That game be rated.

15. That occupiers have power to authorize any number of persons to kill hares, subject only to the Gun Tax.

To carry these objects out, it would be necessary to repeal and qualify much statute law.

Various schemes for putting an end to the evils of the game laws were brought to the notice of the Select Committee, some of the most important of which should be here noticed.

The remedy of the English Chamber of Agriculture and the Farmers Club is that hares and rabbits be taken out of the Game List—a joint and inalienable right by landlord and tenant to kill ground game and a more discriminating law of trespass. Mr. C. S. Read, M.P., who gives this opinion, was sent to represent that Chamber, and at p. 158 of the evidence, in 1872, with reference to this inalienable right, had put to him the following questions:—

4028—“It would be an interference with the law of contract, would it not, if that law were passed?—It would.

“Do you approve of interfering with the freedom of contract?—Most certainly.

“Under all circumstances, or within certain limits?—Within certain limits.

The remedy of the Norfolk Chamber of Agriculture is a joint and inalienable right in landlord and tenant to kill hares and rabbits.* The Scotch Chamber of Agriculture has passed a resolution for the entire abolition of the game laws.† The York Chamber of Agriculture is of opinion that under no circumstances should a landlord be permitted by law to reserve the exclusive right to preserve hares and rabbits. The Select Committee was expressly of opinion that

* Rep. 1872, p. 75.

† *Id.* p. 240;

game should not be made property, and it is, therefore, very difficult to discover on what principle their Report is founded. It is, in short, a pure expediency Report, and leaves the power of landlords over tenants with regard to the preservation of game almost untouched.

It is not an efficient or comprehensive Report. It is confined to a few wild animals, whereas the country requires a single Statute to be intituled, "The Wild Animals Preservation Act," or to that effect, and there is nothing to prevent a tenant contracting himself out of the benefit of the measure the Select Committee propose. Ought that to be? Let us test that question by the rights of property. At whose capital and labour are hares and rabbits, partridges and pheasants, nurtured and maintained? Assuredly, so far as regards all cultivated grass and cereal food, out of the labour and capital of the tenant, but the consumption of grass and cereal food by winged game is not appreciable, and therefore the capital of the tenant is not exhausted for any legislative purpose by winged game. Who, then, is entitled, according to the law of property, to the saleable value of hares and rabbits? Assuredly the tenants; but the law creates in no person whatever any exclusive right either to kill or capture, or to pursue them. Upon what principle, then, can the law recognise the validity of a contract or inflict a penalty, or give damages, where no right of property exists?

As it seems certain the Report of the Select Committee, if acted upon, will not satisfy the public, let us see what would be the right principle of legislation in lieu of the present game laws. As it has been proved that all wild animals need legal protection, the first principle of legislation should be not to exclude any from protection, except for special reasons—for example, rats should not be preserved unless and until they become an article of food. Let, then, the word "game" be for ever struck out of our Statute Law, and let laws for the protection of all wild animals be framed with a just regard to the welfare of the public and

the rights of property. The first step, therefore, should be the simple abolition of the game laws. That done, first let there be a breeding season of the year defined, and make the pursuit of the protected animals during that season, either for the purpose of taking their eggs or young, an unlawful act by any person or persons whomsoever. So soon as the breeding season is over, let it be lawful for all persons, but subject to the rights of property, to pursue and capture wild animals. Hares and rabbits being nurtured and made saleable at the expense of the cultivator, all cultivators have a common interest in them, and therefore the exclusive right of obtaining possession of them when on their farms should be vested in the tenant farmers. Let, then, the law give effect to that just right. Let a property be created in the tenant to hares and rabbits, not similar to what he has in his domesticated animals, but analogous to the exclusive riparian right to fish for salmon—in the owners of the banks of salmon rivers, and let the infringement of that right be a penal offence. Birds are divided by law into wood birds—*sylvestres*; ground birds—*campestris*; and water birds—*aquiales*. Pheasants are both *sylvestres* and *campestris*, in this sense, but though they roost at night they frequent the ground, in hedgerows and covers by day. Pheasants and partridges are maintained as much almost by insects as by cereal produce, and also quails and landrails.

It has been proved that the landlord has a larger capital in the land than the tenant, and therefore there would be no injustice, but the contrary, done by creating in the landlord a similar exclusive right as regards pheasants, partridges, quails, and landrails. Water birds and woodcocks undoubtedly do no injury to the tenant's crops, nor are they supported at the expense of landlord or tenant; but, inasmuch as if the public had an unlimited right to go on cultivated land for the purpose of killing them, it would be made available for killing hares, rabbits, pheasants, partridges, &c., the exclusive right to pursue and capture water birds and woodcocks should be similar to that relating to pheas-

sants, partridges, &c. As regards grouse, black game, and and bustards, in order to continue a supply to the nation, it is necessary that they should be preserved, and for that purpose an exclusive right to pursue and capture them must be created in some one, and the owner of the soil is that person. The foregoing animals are those which for sporting purposes require the assistance of dogs, and the beating of ground with hunting dogs should be regarded therefore as evidence of a breach of the aforesaid rights of property. The remaining wild birds are the wood birds of every kind, and the going out with a gun to kill them should be regarded as a trespass only; but the law should be sufficiently penal to deter not only that trespass but the indiscriminate invasion of cultivated land, and every landowner or land occupier should be liable in damages to his adjoining neighbour for an excessive preservation of hares or rabbits.

It is believed that those classes from which poachers, for the most part, come, would respect rights of property created upon the principle of securing to landowners and land occupiers the enjoyment of their capital. There are but two other alternatives, namely, either a very stringent law of trespass, or the exposure of cultivated land to the footsteps of the multitude, which would be a gross invasion of the rights of property. Private grounds and gardens would practically belong to the public.

In conclusion we may observe that our first game laws were born in sin, and notwithstanding the lapse of centuries and numerous Acts of Parliament altering and amending them, those in existence have the taint of their first parents. They are founded on no sound principle whatever, and it is proved that it is in the highest degree inexpedient to maintain them; and it is hoped, therefore, that they will be speedily consigned to death, especially as having regard to the rights of capital, there can be no difficulty in providing a sufficient substitute. For that purpose it is not necessary, as has been shown, to make any wild animal the subject of larceny, or to abandon the legal principle that

until captured they belong to nobody. But it is possible to create and defend an exclusive right to pursue and capture them, founded on that principle on which all property depends. The nation is expecting an entire abolition of the game laws, and will willingly submit to new law, which will protect from extermination all wild animals whose existence is conducive to the public good, provided only those new laws are founded in justice both to the landowners, the land occupiers, and the public.

VI.—LEGAL EDUCATION AND THE INNS OF COURT.

IN all human probability the close of the Parliamentary Session of 1875 will find the Inns of Court under new management, and Legal Education reduced to a system. All the obstructions to legislation have been removed. The legal profession has been educated up to the point of change, and the public have learnt at last something about the way our lawyers and judges are manufactured. Not many years ago the profession would, almost as a whole, have been opposed to the reforms now imminent, and would have been perfectly able and ready by the exercise of its influence in either House to prevent their passing into law. We doubt very much whether "the previous question" is any longer possible even if it were thought desirable. The House of Lords is at the command of Lord Selborne and Lord Cairns, as the events of the closing session have clearly demonstrated, and Lord Cairns and Lord Selborne are as much of one mind on this subject as two persons can well be. In the House of Commons there are representatives of the Inns who might be disposed to set up the standard of resistance, but even they would hardly care to repeat the arguments of five years ago, against any change in the

system of education for the bar. If the rights of property were likely to be interfered with, they have no doubt a House of Commons that would not suffer them to be wronged, and as a matter of social ethics even, they would have a much stronger case than many of the assailants are willing to allow. After all, the Inns, as proprietors, are voluntary societies, and every one of their members has a vested interest in the customary distribution of their funds, no matter how absurd and wasteful it may have been. The privilege of eating something like ninety dinners a year at less than half price is a pecuniary benefit capable of being very accurately ascertained, and, on the principles of modern legislation, we must not interfere with the interests of the beneficiary unless we are prepared to make him compensation. It would not appear, however, that there is any intention of attacking the money-chest of the Honourable Societies, and the temper of the times is not very favourable to any such experiment. Lord Selborne, besides, is the very personification of cautious reform, and it will be a most unwise bench that persists in refusing his terms as excessive. All that his Lordship proposes to do in the meantime is to give the Inns a constitution, and to establish a Law School responsible to the State, and working under its sanction and authority. The two schemes are quite distinct, and either might pass without the other. Possibly it will be found that they must be brought into more intimate union than Lord Selborne now contemplates, but whatever may be their fate, they indicate between them the limits of the problem at present before the public, and the nature of the solution likely to be effected.

A brief glance at the institutions under trial will help us to estimate the success of Lord Selborne's proposed reform. First of all we have no public institution for teaching law. The barristers learn their profession, or abstain from learning it, under the rules laid down by the irresponsible Society to which they may happen to belong. The young solicitors are looked after by the Incorporated Law Society. The unprofessional people who may wish to know something about the

laws they are expected to obey, have no provision made for them whatever. In the second place we have, or till yesterday had, four large and wealthy societies invested with a monopoly of practice at the bar, and offering in return no kind of security for the professional knowledge or aptitude of their members. We find the Inns partially occupying the field of legal education, making desperate efforts at the last moment to acquit themselves creditably therein, but resolutely warning off all intruders, and acknowledging responsibility to no power but themselves. We find them insisting on examination, as a necessary preliminary to the call to the bar, and doing their best to teach the subjects in which they examine. But they will teach nobody but their own members, nor will they countenance any association between their own members and the young solicitors or the profane public outside. We find, moreover, that the internal management of the societies in some non-educational matters is in many respects deficient, and in particular the junior bar calls loudly to be represented on the bench. Lord Selborne has undertaken to clear up all this, with the condition staring him in the face that he must not attack the monopoly of the Inns or lay sacrilegious hands upon their private funds. His object has been, through the Inns of Court, to make the teaching of law a reality, instead of a sham, to make it a school for the country instead of a seminary for the bar, and to change the Bench of the Inns into a representative, well-ordered, and responsible body of governors. Some may think the first part of the scheme impossible, while others will hold that the two parts are inseparable in legislation. Lord Selborne is trying to make a legal university which shall be entirely independent of the Inns of Court, without interfering with the ancient privileges of these Societies.

It was no doubt the original intention of those who are associated with Lord Selborne in this movement, if not of Lord Selborne himself, to create a legal University, teaching law to all the world, and giving degrees to persons found duly qualified for that honour. In every essential

respect the institution would have corresponded to the English conception of a University, as both a teaching and examining body. The proposal provoked bitter opposition from two different quarters. The Inns of Court saw their control over aspirants to the bar passing away from them; and the existing Universities and Colleges, professing to teach law, protested against a new competitor being allowed to enter the field against them with such fearful odds in its favour. In other words, it was felt that the new University, being the official school of law, would swamp the legal teaching of the old Universities, and draw away the future lawyers from the colleges altogether. Lord Selborne, in deference to these objections, has abandoned the title of a legal University, but, as we shall point out immediately, it is very doubtful whether the old difficulties will not crop up again in the school of law. That institution, as sketched by its parent, will consist of a President and Senate, who are to be the governing body, a certain number of professors or lecturers, and the students or undergraduates. The Council will be a representative body of thirty, nominated in equal proportions by the Crown, the bar, and the solicitors. The professors will be numerous, and the governing body, of course, will be responsible for their efficiency. Any person may be a student, no matter whether he belongs to an Inn of Court or not. Lord Selborne enlarged on the advantage of bringing both branches of the profession into more immediate contact, and pointed with triumph to the example of Edinburgh, where intending advocates and writers attend the same classes and pass the same examinations. Nobody would pretend that either branch of the profession suffers by the connection, and the aristocracy of solicitors in Edinburgh, the writers to the signet, would resent any comparison with even the most select class of attorneys among ourselves. In Edinburgh, however, it is to be observed that the common legal education of both branches of the profession is carried on by the University, while the testing of the candidates is done by

the separate Societies for themselves. The bar and the solicitors make attendance at the University a *sine quâ non* on candidates, but they satisfy themselves of their qualifications without any help from the Universities. If we understand Lord Selborne's scheme, the school of law will do much more than this. It will teach all who choose to come, and it will examine all who wish to enter the profession. Attendance on lectures will, of course, be voluntarily, but examination, as we understand the scheme, will be compulsory. Nothing would appear to be left for the Inns of Court to do but to establish a receipt of custom, look after the terminal dinners, and take wine with the new-fledged barristers after hall. A certain standard will be fixed for barristers, and another for solicitors, but in both cases the School of Law will settle the matter, and only after the School has been satisfied will the candidates be handed over to the different Societies. There is nothing, so far as we can make out, to prevent an intending solicitor passing the bar examination, or a mere layman passing either or both. Some element of differentiation is attempted by giving the representatives of the bar predominant control over the examinations for barristers, and the representatives of the solicitors will also have special authority over their own candidates. Otherwise the training and the attainments of barristers, solicitors, and educated laymen, will be pretty much the same.

We are not of those who think that any harm will come from sending the students of the Incorporated Law Society and the gentlemen of the Inns of Court into the same class-rooms, although we are inclined to believe that Lord Selborne makes too much of the prospective advantages of the arrangement. The mere accumulation of members in the legal class-rooms is a very questionable benefit, and it is very doubtful whether the best men under any system will be induced to attend the lectures. So long as university honours are estimated as highly as they now are, so long will the universities interfere with the success of the London Law School. It is not indeed desirable that the competition between them should be equal.

But there are much more serious objections to Lord Selborne's scheme in its present form. We have Lord Selborne's word for it that he contemplates no such change in the relations between the bar and the solicitors as was at first apprehended. He does not mean to allow lawyers to practice in either capacity indiscriminately. From Lord Selborne's first proposals, that of a legal university giving qualifying degrees to all comers, the amalgamation of the two branches of the profession would sooner or later have followed. The only distinction between the two sets of practitioners would have been that of local centres; their training, their knowledge, their qualifications would have been the same and tested by the same standard. It would have been asked very soon why we should interpose any obstacles to a solicitor practising as a barrister, or to a barrister practising as a solicitor, seeing that both come down from the same hands and with the same credentials. The next question would have been, why do we prevent persons, certified by the State school as properly qualified, from practising as agents or advocates merely because they have not joined certain ancient and voluntary Societies? It is another question whether Free Trade in advocacy and agency is a good thing or not, and those who dwell upon the objection just stated of course believe that it would be a bad thing. But whether good or bad, we believe it would be the logical result of Lord Selborne's original idea, and it may be expected more or less from the present proposal according as the school approaches more or less to the type of an examining university granting professional degrees. Great as the anomaly now is of four voluntary Societies guarding the approach to the greatest profession in the kingdom, rejecting and admitting according to rules and standards set up by themselves, it would be still greater if their rules and standards were destroyed, and their functions reduced to levying exorbitant fees on all who wished to pass their gates. When they neither educate nor test education, what pretence will there be for continuing the monopoly of the

Inns of Court. Again it may be said that their extinction would not be a thing to be deplored, but that is another question. At present it is held on all sides not to be desirable; and it is a fair argument on the part of the Inns that the legal university would certainly, and the law school may probably, put an end to their existence.

Lord Selborne's plan of giving the bar and solicitors representatives on the School Senate, and then handing over to each section of the Senate the control of the examinations connected with the branch of the profession it represents, does not meet the difficulty, and is besides a bad plan in itself. To be effectual it would split up the Senate into two or three, and even then it would leave intact all the objections that have been urged against the legal university. We have not been quite able to realize the exact meaning of Lord Selborne's very general expression that "regulations as to the qualification of barristers should be made by the preponderating vote of barristers" in the Senate. Why not create a Council of Barristers at once to make such regulations, and how far will the making of regulations extend? If the right of granting admission to the bar is to be handed over to the school of law, we should prefer to have the responsibility of an undivided Senate. What would be thought of a Board of Studies at Oxford which told itself off into sections like the Senate of Lord Selborne's School of Law?

One strong complaint against the Inns of Court in former days was that they were at once a teaching and an examining body, in so far as they affected either character at all. Precisely the same objection may, and probably will, be urged in the House of Commons against Lord Selborne's School of Law. It has long been felt that even in the older Universities the combination of the two capacities has not been productive of good, and although any change in that respect is a long way off there is a very good reason for not creating a new institution with the same disqualifications. The new school ought to be an

Examining University, like the University of London, for degrees in Law only, or a Board like the Civil Service Commission, empowered to test the qualification of all persons seeking to acquire the status and privilege of barrister or solicitor, and leave the teaching to be done by the Inns of Court and the Law Societies under such new management as Lord Selborne indicates. Or, on the other hand, it might be a teaching school, taking up the work from the Inns and Societies, and leaving them to test the attainments of students thus prepared by examinations of their own, under rules laid down or sanctioned by Parliamentary authority. But a Legal University teaching as well as testing, granting degrees to all comers, and superseding every educational function of the existing associations, is an institution open on every side to fatal objections. Lord Selborne must take his choice between making his School of Law a body for testing the work done by the Inns and other Societies, or for supplying work to be tested by them.

Lord Cairns would, it appears, make the legal university merely an examining authority. He holds that the public has a right to require, and Parliament is justified in creating, a body "whose duty it should be to secure that no person was admitted to the bar or allowed to enter upon the practice of the other branch of the profession without having passed examinations with a view to test his fitness for entering that branch of the profession in which he desired to practice." His reason for saying that the functions of that body ought not to extend further than examining was this—he believed that any attempt to procure funds for a teaching school would fail, and next he believed that if they set up a new teaching legal school, they must of necessity exhaust and destroy the Inns of Court and their capacity for teaching. These words show a vast difference of opinion between the two learned lords on the fundamental lines of the new institutions. Lord Cairns would appear to hold that the public have not a right to demand an authoritative school of law, and would appear to contemplate the continuance of the

Inns of Court lectures, in competition with such a body, even if it were established. In both particulars Lord Selborne, we should suppose, takes the opposite view. He expressly proposes to exhaust the capacity of the Inns of Court as a teaching body, and he has dwelt far more powerfully on the advantages of the school in teaching law than in testing the qualifications of lawyers.

Our own opinion would be in favour of confining the new school to the function of teaching every variety of legal knowledge to all comers. Lord Cairns' difficulty about funds would not arise, for a most efficient school could be maintained for £10,000 a year, and we believe from Lord Selborne's figures that the different Societies would find no trouble in supplying that sum. The Inns of Court would be relieved from teaching, but would be empowered and required to test the fitness of candidates under a standard supplied to them by public authority. The new school might be constituted, as Lord Selborne proposes, or with such modification of that scheme, as Lord Cairns suggests. Every difficulty, we believe, would be met by this arrangement. The universities would not be offended by competing degrees in law, the anomaly of qualified persons being excluded from the profession by an arbitrary rule would not exist, the danger of combining teaching with examining functions would be avoided, and all the advantages of a public school of law and of combined lectures for intending attorneys and barristers would be secured. This, we may remind Lord Selborne, is much more like the Scotch arrangements to which he referred than his own scheme is. The University of Edinburgh does not admit to the bar, nor does the Faculty of Advocates educate students. The University educates and the faculty examines and admits. On the plan now suggested the Inns of Court would examine and admit, and the school of law or any other private or public teaching body would educate.

We can conceive of only one objection to this proposal, and that is the wide-spread distrust of the Inns of Court.

Lord Selborne seems to have abandoned the idea of turning these bodies to account in education. He praises them good humouredly for their imperfect attempts, and promises not to take more money from them than he absolutely requires. The Legal Education Association, which is entitled to the greatest possible credit for its successful exertions in making the question a national and practical one, has unfortunately got itself into a position of decided antagonism to the benchers. No educational reformers will believe that these learned persons are in earnest about education, and in this, we do not say unnatural distrust, they are prepared to throw away an institution which is lying ready to their hands. We feel bound to protest against this distrust and its results. No doubt if the question had been left to the benchers, it might have slumbered till the end of the century or longer. No doubt they do not form a very good board for the superintendence of a working university. But we fail to see that they could not adequately discharge the duty of carrying out such rules respecting the qualification of members as the State, in its wisdom and power, might impose upon them. Doubtless they would never, of themselves, have thought of making such rules, but, zealous as they are of their rights and privileges, the most determined obstructive among them could not resist the right of the State to require whatever qualification it pleases in members of a privileged profession. We do not believe that the Inns of Court would fail to enforce any such regulations with firmness, strictness, and loyalty. Why go out of our way to elect a Senate of a legal university, when we have all the materials before us, already organized and already in working order? Is not the Council of Legal Education as good an examining body as any barristerial section of any new Senate is likely to be? Why suffer four powerful Societies to exist in a mutilated and useless connection when there is useful work for them to do? Above all, why take the trouble of incorporating and reforming these Societies if they are to do nothing but build new chambers and look after the students' dinners?

And this brings us to the second of Lord Selborne's proposals now embodied in the Bill which he submitted to the House of Lords. Lord Selborne invites criticism, and promises any amount of modification in this part of his programme. The chief effect of the measure is to incorporate each of the four Inns, and to introduce the principle of representation in elections to the Bench. The Bill is so arranged that the discussion of its provisions need not be hampered by any consideration of what is likely to be done with the education question. The measure is merely one of internal re-arrangement. Incorporation is the inevitable preliminary to any legislative dealing with these Societies. Lord Selborne proposes that Lincoln's Inn should have fifty benchers, the Temples forty each, and Gray's Inn twenty, exclusive of members of the Royal Family, Privy Councillors, and Judges, who, however, are to have all the rights and privileges of ordinary masters of the Bench. Vacancies are to be filled up alternately by the bench and by the practising barristers of not less than five years' standing. Who are practising barristers is to be determined by the Law List in the meantime, and afterwards by an official roll. The progress in cases of discipline is regulated by an important section of the Bill, which recent events in the profession will cause to be keenly criticized. The judges of Her Majesty's High Court of Justice are to be visitors of the different corporations, and may exercise their functions through a committee. We do not know what the feeling of the Benchers may be with reference to these proposals, but the Bar on the whole will be glad to see some such scheme introduced into Parliament next year. Lord Selborne's Bill is a very modest and cautious interference with the constitution of the Societies, and the most serious novelty it introduces is the limitation of the suffrage to practising barristers in England of five years' standing. Even the limitation of time is a thing about which a good deal might be said, but the wisdom of the restriction to practising barristers is about as clear to us as the possibility of ascertaining who practis-

ing barristers are. Lord Selborne could hardly have anticipated the mere difficulty of making up a satisfactory roll. How many briefs must a man have to be a practising barrister, or how is he to prove his practice? Is the roll to be annually purged of barristers whose practise has fallen away, or who have ceased to practice? If a colonial judge or barrister comes home, is he to find himself in the position of a disfranchised member of his Inn? Imagine the same condition applied to any other profession—to clergymen, say, or doctors. And what after all is the danger apprehended by Lord Selborne? That men may come up to the election of Benchers and swamp the votes of the practising barristers. Surely men who have been found worthy of admission to the profession, who are just as much as practising barristers, interested in the good management of the Inn, ought not to be dealt with in this manner. We have yet to learn that the non-practising members of the profession are less worthy of the trust, or less interested in the welfare of their Societies than their more fortunate or more ambitious brethren. After all Lord Selborne would secure his end very simply by not permitting voting papers or proxies at the election. A poll would undoubtedly exclude all but barristers on the spot or men with a more than ordinary interest in the Inns. One other point of detail may be mentioned. The visitors are to be the judges of the High Court of Justice, not merely the judges of the Supreme Court of Judicature. Why should the appeal judges be excluded and the less distinguished portion of the Bench selected for the dignity of visitation? We observe, too, that the visitors will themselves be members of the governing body of the Corporations they have to visit, an arrangement which we believe to be contrary to the soundest maxims of Corporation ethics. These, however, are mere blemishes on an excellent piece of legislative work. Lord Cairns wishes the Inns of Court to be allowed to reform themselves under a commission. We should have no objection to such a course, were it not that the delay would be intolerable, and in the end we should not be likely to get anything better than Lord Selborne now offers.

VII.—RE-ORGANIZATION OF THE CIRCUITS.

IN the *Times* of the 16th of June last there is quoted, *in extenso*, the text of the fifth (embryo) Report and Recommendations of the Judicature Commission. In the course of the Report there appears the following announcement with reference to the proposed re-organization of the Circuits, "On this subject the report quotes, at length, an article from the *Law Magazine* of May, 1873." On further investigating the matter, we have been enabled to ascertain that not only does the Commission quote from the article in question, but absolutely adopts most of the suggestions it contains, and strongly recommend the proposed alterations set forth in that article for the approval of the learned judges. On receipt of this Report from the Commission, the learned judges, we are informed, held very many meetings, and the subject of the re-organization of the circuits occupied a prominent place in the deliberations, more so than any other subject involved in the Judicature Act, excepting, of course, the new rules of procedure. Day after day their lordships rose early at Westminster and Guildhall in order to attend these diurnal meetings on the subject. In the course of their sittings we are informed that many of our suggestions were received and warmly debated by their lordships. After a delay of several months, however, they succeeded in adjusting preliminary steps in connection with the Judicature Act, by the re-arrangement of the circuits, and recently the result of their collective wisdom has been printed for private circulation, and made known to a privileged few, but whether their lordships have adopted all the suggestions contained in the article mentioned we are at present unable to say, owing to the secrecy of the matter, but, for the instruction of our readers, we quote the article in question containing the suggestions.

"Considering the fact that Lancashire presented 182 cases to the judges for trial on the last circuit, and that this number is not a very unusual one, there can be little doubt that the county of Lancaster, with its three assize towns, will be made

a separate circuit. This has long been considered not only necessary, but also a very desirable alteration, and Lancashire is itself very desirous of such a course being pursued. It is now evident that this would have been the proper course, when, in 1863, the Northern Circuit was divided by being shorn of the County of York.

The next question which arises is, what is the best thing to be done with the other counties at present forming the Northern Circuit. We think that there is only one practicable plan to be adopted, *i.e.*, to add these counties to Yorkshire, and so make the Northern Circuit consist of the same counties, minus Lancashire, as it consisted of at the division in 1863. The business of the Northern Circuit so constituted will thus be considerably less than the business of the county of Lancaster alone. Taking the last circuit as an example, we find that the causes on the whole Northern Circuit amounted to 240, and that of these Lancashire supplied 182. On the same circuit Yorkshire supplied 104 cases (rather more than its usual number); these added to the Northern Circuit, minus Lancashire, give 162 causes for a circuit formed of the northern counties and Yorkshire; but, as the Yorkshire business was at the last spring assizes rather more than usual, as we believe was that of the other northern counties, we might expect an average of 150 causes on such a circuit as we suggest, calculated on the present circuit arrangements. A suggestion, has, however, been made which we consider a most practical one, *viz.*, to give Yorkshire a winter assize in the same manner as Lancashire. This is only a fair concession to the amount and importance of Yorkshire business. Such a proceeding would certainly reduce the cause list at the spring assizes at Leeds, and most probably at the summer assizes also; so that it might be calculated that the Northern Circuit would, under the proposed plan, average from 130 to 140 cases, *i.e.*, something less than the present Midland Circuit, an amount of business which there would be no difficulty in despatching in from five to six weeks, the usual time allowed for a circuit.

We would suggest, moreover, that, should a winter assize be established for Yorkshire, that the assize should be held at York and not at Leeds. York is very central, is quite as easily approached from, and is as near to, most of the southern parts of the West Riding as Leeds. York is much more easily approached from the southern parts of the county of Durham and the northern parts of the North Riding than Leeds. A winter assize, therefore, held at York would not only accommodate the Yorkshire business, but it would also give better facilities than Leeds to that business, which is very fast increasing, in the south of Durham and the north of Yorkshire, *i.e.*, at Darlington, Stockton, and Middles-

borough. The Bar, we believe, would certainly prefer York to Leeds for a winter assize, the southern division of the West Riding have a marked preference for York rather than Leeds as an assize town, and, what is equally important, the judges, we believe, entertain the same preference. We are also of opinion that the last town on a circuit should be the most central town of the circuit, so as to give facilities for causes necessarily late being tried as near their proper venue as possible.

The execution of this plan will create an additional circuit, and so one of two plans must be adopted; either the Government must create fresh judges, or the remaining circuits must be redistributed so as to diminish their number by one. We certainly think the latter plan is quite feasible, as some of the circuits are far from overburdened with work.

The plan which we should recommend as both simple and feasible is this: Divide the English circuits thus—Home, Western, Eastern, Midland; abolish the Oxford as a circuit, and alter the Welsh circuits; increase the Home circuit by Winchester, Reading, and Aylesbury; give Gloucester to the Western Circuit; let the present Norfolk Circuit be called the Eastern Circuit, add to this Lincolnshire, taking away Leicester; form a Midland Circuit consisting of the counties of Derby, Nottingham, Leicester, Stafford, Birmingham (abolishing Warwick) Worcester, and Oxford.

With regard to the three remaining counties—Shropshire, Hereford, and Monmouth—giving Shropshire to the North Wales Circuit, and Hereford and Monmouth to the South Wales Circuit. Radnorshire might with advantage be transferred to the South Wales Circuit.

The circuits would thus consist as follows :

Northern.—Northumberland, Westmoreland, Cumberland, Durham, Yorkshire.

Lancashire.

Home.—Hertfordshire, Essex, Buckinghamshire, Berkshire, Hampshire, Sussex, Surrey, Kent.

Western.—Wiltshire, Dorsetshire, Somersetshire, Gloucestershire, Devonshire, Cornwall.

Eastern.—Suffolk, Norfolk, Bedfordshire, Huntingdonshire, Cambridgeshire, Lincolnshire, Rutlandshire, Northamptonshire.

Midland.—Derbyshire, Nottinghamshire, Leicestershire, Staffordshire, Worcestershire, Warwickshire, Oxfordshire.

North Wales.—Montgomeryshire, Merionethshire, Carnarvonshire, Anglesea, Denbighshire, Flintshire, Shropshire, Cheshire,

South Wales.—Pembrokeshire, Cardiganshire, Carmarthen-

shire, Brecknockshire, Radmorshire, Glamorganshire, Monmouthshire, Herefordshire, Cheshire.

The following objections will probably be raised to such a re-distribution:—That the Home Circuit is large enough already. Our answer is, that it is and that it is not. Taking into account that so much London business is always done at the last town of the Home Circuit, the circuit is quite heavy enough already, but we hope that some arrangement will shortly be made, as appears to be contemplated by the 31st section of the Judicature Bill, which will result in the business of London being done in London at some better constituted form of Metropolitan sittings. Take away the London business from the Home Circuit, and, as we propose it, it will be a light one in respect of business, nor will it be inconveniently large. That the rest of the plan is objectionable, because it gives too many towns to some circuits. There may be some force in the objection, but it will be diminished if a simple, and, we think, a reasonable plan be adopted. It is this: at certain places, where the business does not amount to much and where two such counties adjoin, hold an assize for both counties alternately in one of these counties only. Take, for instance, Cambridge and Huntingdon; the same gentleman always acts as sheriff for both of these counties at the same time, the business is always small, the towns are very near to one another. We cannot see, in these railway days, what inconvenience or injustice would ensue if the spring assizes were held at Huntingdon, and the summer assizes at Cambridge. It may also be questionable whether it is at all worth while holding an assize at Oakham. Leicester is but a very few miles away from Oakham, and, as to this county, the whole business, when there is any, might be done at Leicester.

There are other counties, such as Derby and Nottingham (these towns being very near each other), to which the plan of an alternate assize might, with advantage, be applied; and this arrangement would, we venture to think, be particularly appropriate to the Welsh counties.

As a matter of deep interest to many members of the bar, who will be considerably affected, professionally and pecuniarily, by any kind of alteration of the Circuits that may be decided upon, the issue of the Report of the Commissioners will be looked forward to with great interest, now that the operation of the Judicature Act has been postponed, during the interval that must necessarily ensue before the publication of the Report. We are given to understand that their lordships have resolved to create an entirely new Circuit, to

be called the North Eastern, which will comprise Manchester, Liverpool, Lancaster, Carlisle, and Appleby. The Northern Circuit will henceforth retain Durham and Newcastle-upon-Tyne, and take from the Midland, York and Leeds. The Midland thus shown will have added to it Bedford, Leicester, Aylesbury, Northampton, and Oakham, taken from the Norfolk Circuit, which we suppose will be retained as the Eastern, to comprise Cambridge, Huntingdon, Norwich, and Ipswich. The Home, it is said, will be abolished, but of this, in its entirety, we have some doubt.

LEGAL TOPICS.

NOVATION IN INSURANCE.—The extremely important question of novation, to which we have referred in previous numbers, has occupied a very prominent place in the Albert Arbitration before Lord Cairns, and in the European Arbitration before Lord Westbury. The same question has been recently brought also before Lord Romilly, who is now acting as Lord Westbury's successor, in unravelling complicated affairs of the European Arbitration. We now reproduce an able article on the subject which recently made its appearance in *THE REVIEW*, a journal chiefly devoted to insurance literature, *apropos* of a leader in the *Times*.

"A recent number of the *Times* contains a leading article on the past and present working of the European Arbitration. After remarking with regard to the European Arbitration that 'it fell first to Lord Westbury to dissect the intricate complications of facts, and the delicate questions of unsettled law which arose out of its misfortunes,' the writer states, what we suppose most persons conversant with the subject will be disposed at once to endorse, viz., 'that the Law of Insurance has, beyond dispute, been greatly enriched by his decisions.'" Our writer in the *Times* then proceeds in the following manner: 'But one striking feature of his acts as arbitrator was the *apparent* difference of his view as to the mutual responsibilities of the insurance companies and their policy-holders from that which Lord Cairns had upheld during his conduct of the Albert Arbitration. The incongruity was, as we believe, *far more apparent than real*, and might be traced very satisfactorily to the dissimilarity of circumstances in the cases respectively decided.'

After this he adds somewhat *naïvely*, 'But it must be admitted that a sort of uncertainty was, in fact, cast upon the interpretation with reference to Insurance Companies of the important legal doctrine of 'Novation,' and of others only second to this in legal significance. The practical inconvenience from the seeming conflict of decisions was aggravated by the impossibility of appealing to any regular Court to adjudicate between and reconcile opinions technically hardly judicial, though possessing in effect judicial authority.' We may here remark, *en passant*, that not one of the decisions of any of the arbitrators possesses the very slightest judicial authority, and that several of the judges in the Equity Courts have refused even to listen to them when counsel attempted to cite them in argument.

Sydney Smith, we believe, once laid it down as a general rule, that a man who is anxious to write a slashing and effective criticism on a book ought to be particularly careful not to read the book before he took up his critical pen—it prejudiced the mind so, he said. We are afraid that the mental preparation through which the writer in the *Times* passed previously to writing the article at present under consideration must have been of a similar character to that which was recommended by the Rev. Sydney to the would-be critic. If he had perused, even in the most cursory manner, the leading decisions of Lord Cairns and Lord Westbury on the subject of novation, he could not, we think, have avoided seeing that there was the most real difference possible between their views upon this question; that, in fact, the principles laid down by Lord Cairns in the course of the arbitration were diametrically opposed to the principles laid down by Lord Westbury, and 'that the dissimilarity of circumstances in the cases respectively decided' affords no explanation whatever of the difference in the decisions.

The principle on which Lord Cairns proceeded throughout the whole of the Albert Arbitration was, that the entire onus of showing that there was no novation lay upon the policy-holder. He, in fact, considered that when a policy-holder paid his premiums to, and accepted receipts from, some other company than that one with which he had originally contracted them (to quote his own word-), 'the burden of explaining the apparent irregularity of the receipt, the apparent variance, the open variance between the receipt and the payment of the premiums contemplated by the policy,' lay upon the policy-holder who produced what was to be considered as an improper receipt. Indeed, in one of the last cases which came before him on the subject of novation he expressed himself as follows: 'I have, in cases that are now very numerous, held that were persons have allowed themselves to drift into dealing with the

amalgamated company, to enter into relations with that new company and pay premiums, and to make no protest with regard to the footing upon which they are paying those premiums, they lose the security of the old company and become creditors of the new.'

Let us now compare these propositions laid down by Lord Cairns with the principles upon the subject of novation which were established by Lord Westbury. The whole mass of his decisions indeed is in the same direction, and it will appear to any one who has followed Lord Westbury's decisions with any degree of attention to be a perfectly idle task to select from his judgments any authorities upon such a subject. We shall, however, venture to lay before our readers a few of the most striking passages. In one of his earlier judgments—several of Lord Cairns's decisions having been cited to him—he said, 'Now it has been argued at the bar here—and I am sorry to say that some colour has been furnished for that argument by some of the technical decisions which have been cited—as if it was incumbent upon the policy-holder to prove that he did not intend to adopt and to accept by way of substitution the liability of the transferee company. That is quite an inversion of the proper order. It is incumbent upon the company which alleges a substitution, or what has been termed a novation, to prove an agreement by the policy-holder to make that novation, and to prove acts of the policy-holder, in the absence of any written declaration, that unequivocally involve the evidence of that intention on the part of the policy-holder to accept the new company instead of the old.' The three rules on the subject of novation which Lord Westbury laid down at an early stage of the arbitration, for the guidance of counsel, and from which he never subsequently seceded in the least, are also express on the point. The third of these rules was that 'the acceptance of the offer by the policy-holder should be proved by acts, which would unequivocally denote his understanding and acceptance of the proposal, to accept a new contract in lieu of the old.' The following extracts from several of his judgments will, we think, put the matter beyond the possibility of doubt:—'I am extremely unwilling, and shall always remain unwilling, to transfer one policy-holder from his original company to another company unless I have clear and indisputable proof that the policy-holder did deliberately elect to take the second company in lieu of the former, that must be founded upon facts and circumstances that unmistakably warrant that conclusion.' 'I have again and again stated that I will not be misled by this term novation, that I will not pay any attention to it unless the parties

can show me that there was an express contract to substitute the second company instead of the first, and that the parties entered into the contract knowingly and advisedly, and that they entered into the contract that the second should bear the burden, and not only bear it as well as the first, but that they should bear it to the exclusion of the first and in substitution for the first.' 'I repeat again, I will not transfer a man who is a creditor from one person to another, and bind him to take that course, unless I have most unequivocal proof that it was done with his knowledge, and that he has subsequently assented to it, and that with competent information on the nature of the case he has agreed to accept the new debtor instead of the old.' In Swift's case the argument was strongly pressed that Mr. Swift had, by paying his policies to the transferee company, abandoned all right to prove against his original company. To this argument, which would have been, according to Lord Cairns's view of the question, of perfectly irresistible power, Lord Westbury replied as follows: 'What Mr. Swift did was therefore nothing in the world more than an acquiescence in the transfer of that business, and payment of the premiums in accordance with the notice he had received, amounting to no more than this—as if the Royal Naval Society had told him, 'Our bankers are henceforth the London and Westminster or any other; please to pay your premiums into the London and Westminster Bank.' He did pay his premiums to the assignee, agent, and attorney of the Royal Naval Society, he did nothing more." Lord Westbury consequently held that in this case there was no novation. Lord Cairns would have unquestionably held that such a case as this was the clearest case of novation possible.

One point more and we have done. The writer in the *Times* seems to think that the 'conclusions,' deducible from the decisions of the various arbitrators, may at all events 'supply materials for legislation.' We do not wish to be hard; we do not in fact wish to make against the writer in the *Times* any such violent presumptions as Lord Cairns was in the habit of making against the unfortunate policyholders who came before him. But surely, this looks uncommonly like as if our writer had never even heard of the Life Insurance Companies Act, 1872. We will, therefore, take the liberty of referring him to its 7th section, the passing of which is, we believe, very largely to be attributed to a series of articles which appeared in the columns of *The Review* in the months of April and May, 1872—i.e. several months before Lord Westbury commenced his sittings as arbitrator. [The practical effect of this enactment is to

establish Lord Westbury's views on the subject of novation, which we had previously advocated as the law by which the future of life insurance is to be governed.] After so doing we shall for the present take leave of our writer, and content ourselves with warning him to abstain for the future from entering upon a discussion on difficult questions in Insurance Law without a very much more intimate acquaintance with the subject than that which he has displayed in his recent article."

ADULTERATION.—The Report from the Select Committee on the Adulteration of Food Act, 1872, while congratulating the public on the fact that they are cheated rather than poisoned, substantially adopts the suggestion made in our June number. One proposition the Committee offer is, that the inspector should leave with the trader a duplicate sample of the goods he intends to have analysed, properly securing and sealing the same in the presence of the vendor, and that in no case shall more than one month elapse before the result of the investigation is made known to the trader. It is no small gain to the public that after the outcry made by the trading community the Committee recommend that the Act should be compulsory.

COMMISSION ON THE PURCHASE OF STORES.—The inquiry by a Select Committee of the House of Commons into the existing principles and practice which, in the several public departments and bodies regulate the purchase and sale of materials and stores, while it proves the integrity of the much-abused officers employed in these departments, suggests that all amendments have proceeded from the introduction of new blood, and the application of commercial principles by commercial men. Members of committees have, it appears, yet to learn that while any suggestions of improvement when made within the Civil Service, are most determinately stamped out, any amendment from without is accepted by the heads of the departments with apparent satisfaction, because they dare not snub the promoters.

GENEVA CONFERENCE ON REFORM AND CODIFICATION OF INTERNATIONAL LAW.—The Association for the Reform and Codification of International Law, which held its first sittings at the Hôtel de Ville, Brussels, in October last, the General Secretary Mr. H. D. Jencken, by order of the Council in London, has issued circulars convening a second meeting at the Hôtel de Ville, Geneva, on the 7th September next. This Conference, we learn, will be attended by many eminent jurists and publicists from different parts of Europe, and though the proceedings by no means will assume a diplomatic character, the grave importance of the subjects to be discussed has induced the great Continental powers to countenance the proceedings. The illustrious Bluntschli and Goldschmidt from Germany have been invited to attend. Professor Mancini, of Rome, M. Asser, of Amsterdam, will, it is said, likewise be present. Advices from Boston, New York, and other places, mention that representatives are preparing to leave for Europe. The English Bar will likewise be represented: Sir Vernon Harcourt, Mr. Hinde Palmer, Mr. Osborne Morgan, Serjeant Simon, and others have been invited to attend. Mr. Thomas Webster will read a paper on Property in Intellectual Labour; Mr. H. D. Jencken, the General Secretary of the Association, has agreed to bring forward, in a treatise he has prepared, the very important question of "The International Laws regulating Negotiable Securities," including bonds and shares. Professor Amos and Professor Leone Levi will also it is hoped be present and contribute their share to the valuable matters to be considered at the Conference.

IRELAND.

THE IRISH JUDICATURE BILL.—This Bill has made remarkably slow progress, and unless it be very vigorously pushed through during the last days of July and the early days of August, it will be thrown over altogether into the *limbo* of dropped measures. Unquestionably its unpopularity

here is owing to a want of knowledge of, and sympathy with, Irish professional feeling on the part of the framers of the measure, who seem to have also left out of consideration the peculiar questions in Ireland arising out of the chanceryship, the Bankruptcy, and Landed Estates jurisdictions, &c. Their knowledge of the details of the problem before them seems to have been very limited.

That an opening so presented was observed and made use of by the Right Hon. Mr. Christian (our Chancery Appeal Judge) is by no means surprising. It is a highly fortunate circumstance for this country that having no Minister of Justice, and an Attorney General domiciled during the Parliamentary Session in London, a most competent hand is found to draw public attention to the defects of legal institutions and of legal measures. The Lord Justice's former criticism of the proceedings in the Lord Chancellor's chambers was well-timed, and the results have been evident, in increased caution on the part of subordinates, that the limits of their authority should not be over stepped. The same distinguished writer has, on later occasions, and now once more taken in hand the constitution of the Equity and Bankruptcy Courts, and the results of this enquiry are believed to be that no inconsiderable modification will be made in the Government Judicature Scheme. The old number of twelve Common Law Judges is, it seems, to be maintained in deference to the feelings of both branches of the legal profession; but inasmuch as there is by no means business to occupy the hands of twelve judges, there is to be a gradual absorption by them of the whole Probate, Bankruptcy, and Insolvency business of the country. After a time these Courts last referred to will have no separate existence.

THE COURTS AND LEGAL ARRANGEMENTS.—The fate of the Landed Estates jurisdiction is not yet determined. Personal claims stand (here as elsewhere) in the way; and the desire to deal with a public question on public grounds seems wanting.

In strong confirmation of Lord J. Christian's statement as

to the quantity of business to be transacted by the several branches of judicature in Ireland, are the latest returns of proceedings. These show (if indeed any further proof were necessary) that—roughly stated—the staff of Judges is in England in the proportion of three against two in Ireland; while the business transacted over the channel is six times as much as here.

The Lord Justice observes on the tendency to give undue incomes to several of the Irish Judges, whose influence in the House of Commons and at the Treasury must be very considerable. Very few of them have not materially augmented their incomes by attaining to the bench; and a salary of £2500, or, at the outside, £3000, commands the services of the leaders of the bar both in Law and Equity; excepting only that some one advocate, like Mr. Sergeant Armstrong of this day, or Mr. Brewster of ten years since, will usually be found superior to such attractions. Ingeniously enough the theory has been set afloat, that salaries must be so arranged as to attract the foremost talent of the bar, a theory on the face of it absurd, and “floated” for special purposes. This fallacy will hardly impose, one would think, on the House of Commons at ordinary times; but at the dreary end of a summer session, no prediction would be safe as to what may or may not be carried.

The *Irish Law Times* remarks on the extraordinary fact that (Acts of Parliament and Rules notwithstanding) the Judges here do not actually sit in chambers. The consequences of this are more serious than our contemporary supposes. Chamber business is highly conducive to economy and to the rapid dispatch of business; and it keeps out of the public journals many matters which need not be made public. Here is therefore considerable space for improvement in the various Courts of Dublin.

After the closing of this session, the Right Hon. J. T. Ball M.P. (Attorney-General), will become Chancellor, and it is not yet known who will succeed him. His colleagues, Mr. Ormsby, Q.C., and Mr. May, Q.C., are not in Parlia-

ment. The common belief is that Her Majesty's advisers are hoping to send forward some competent lawyer, who may gain the seat for the University which Dr. Ball will vacate; and in this way one difficulty may perhaps be removed.

The latest piece of intelligence is that the venerable Mr. Brewster, formerly Law Officer and Lord Chancellor of Ireland (of whom a memoir with portrait appears in the last number of the *Dublin University Magazine*) is seriously ill. He was for twenty years in the enjoyment of the largest and most lucrative legal practice which the present generation has seen.

Postscript.—Since the above was written the Irish Judicature Bill has been dropped; and there is hope that before next year Her Majesty's advisers will take the trouble to inform themselves more completely as to the details of the intricate machine which they propose to take to pieces and reconstruct.

The Right. Hon. A. Brewster, ex-Chancellor, died on the 26th. He was born in the year 1796, called to the bar in 1819, and appointed Q.C. in 1835. He was nominated Solicitor-General in 1846; and although strongly Conservative by instinct, took office under the Whig and Peelite Coalition in 1853. Mr. Brewster never sat in Parliament, as he preferred the quiet accumulation of wealth—supreme in the highest walk of a profession which he loved. No cause of importance has been tried in Ireland during this generation in which he was not engaged. His only son was the popular Colonel Brewster, to whom a memorial was lately placed at Lincoln's Inn.

BOOK REVIEWS.

AN EXPLANATION OF ANCIENT TERMS AND MEASURES OF LAND; WITH SOME ACCOUNT OF OLD TENURES.—By PHILIP H. HORE. (London: Pickering, 1874.)—The design of this work is better than its execution: its object is to give, in a convenient form, explanations of old law terms relating to tenures and measures of land, subjects which are principally treated of in

works almost inaccessible to the general reader, or inconvenient to consult, such as "Domesday Book," Dugdale's "Monasticon," Sir W. Raleigh's "Discourse on Tenures," &c., and it is in the extracts given from these authorities that the chief value of the book consists. From the omissions and inaccuracies on subjects more familiar to the legal antiquary the author would seem to have comparatively neglected many well-known books, such as "Bracton," "Coke upon Littleton," Hallam's "Middle Ages," Professor Stubbs's works, Mr. Hazlitt's new edition of "Blount's Tenures," Elton's "Tenures of Kent," &c. The author remarks that he cannot claim "any merit of originality" in the compilation of his book. Of course, in one sense, originality is out of the question in a glossary, where the author has merely to discover what the old authors meant by the terms which they use, but in doing so originality of investigation is not only possible but indispensable, and it is here that Mr. Hore is most deficient; he gives dicta from Dr. Cowel and similar writers as if they were infallible, and without even suggesting that there may be another view of the matter, while in fact legal antiquarians differ from one another as much as any other *doctores*, and their conclusions for the most part require testing before they can be accepted. Thus the only explanation of *villa* given by Mr. Hore is: "'Villa' was another term for 'a manor or lordship,'" which is not the only or even the most common meaning of the word, or Bracton would hardly oppose it to manor, and say that a manor may consist of several *villæ*. "Berewic" he defines "as a member severed from the body of a manor," which is a translation of Spelman's "*membrum manerii a corpore dissitum*," whereas *dissitum* means "lying apart;" *severed* in legal language means separate and distinct, but when a berewic has anything to do with a manor it is appurtenant to it. Mr. Hore's descriptions of frank fee, base fee, manor, escheat, escutage, homage-liege, paravail, fee tail, charter-land, &c., are similarly obscure and inaccurate; he has quite misunderstood Spelman's explanation of blench tenure. As to the meaning of *servitium unius militis* (p. 72) we beg to refer Mr. Hore to Co. Litt. 47 b.

Mr. Hore seldom troubles himself to trace the history of a word through its various meanings, or to compare the legal institutions of one country with those of another, although these are the most fertile methods of clearing up difficulties, and the most interesting mode of explaining them to the student. In a work which deals with measures of land we naturally expect a comparison of the various modes of measuring land used by different nations, and at all events an attempt to explain why they were chosen,

but Mr. Hore makes no comment on the origin of carrucates, hides, oxgangs, &c., nor does he compare them with the analogous institutions of the Romans and ancient Germans. If Mr. Hore had traced the word *demesne* from the primary meaning of *dominicum*, he would not have said that "demesne is sometimes used also in opposition to frank fee lands," or that "in England no common person has any domain or demesne simply understood." How does the author explain Britton's statement that the lords of franchises may hang their tenants "sur lour fourches demeyne," and that "demeyne proprement est tenement qe chescun tient severalement in fee"? The article on tenure in capite suffers from the same defect. "Allodium," says Mr. Hore, is "the ancient Saxon term for land held of a man's own right, . . . and is supposed to have been derived from the Celtic 'allod' i.e. *ancient*." This is quite new to us.

The author sometimes goes out of his way to explain subjects which have hardly any connection with measures or tenures, and generally with not very successful results. "Leasehold is a tenancy under lease or special agreement for any definite term, whether of lives or years, and admits of several distinctions." "Mortmain, from the French 'dead hand,' is the possession of lands in dead hands, or hands that cannot alienate them." We were under the impression that mortmain meant *unproductive* ownership, i.e., without escheats, reliefs, marriages, &c., "for that a dead hand yieldeth no service," as Coke says. The dissertation on the rights of the executors of an incumbent who dies before harvest (p. 36) seems to us equally out of place.

In a work for beginners it is important to distinguish between what is obsolete and what still exists as a living institution; perhaps no student would believe Mr. Hore when he says that "in this manner [*i.e.*, by kneeling, kissing, &c.] the lord of the fee for which homage is due takes homage of every tenant as he comes to the land or fee," but it would have been as well to explain that homage was abolished in Charles II.'s reign.

Among tenures by curious services mentioned by Mr. Hore is one on condition of "keeping a boat to ferry the judge over the Pill or Pole water as often as the Sessions should be held at Wexford," but we doubt whether this is tenure by grand serjeanty, as the author states. Coke says: "To finde the king so many ships for his passage, is called *liberum servitium* . . . and therefore clearly such a tenure is neither grand serjeanty nor knight's service, because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found" (Co. Litt. 108a). However, as the author is tenant of the land

in question he may have some reason for being of a different opinion.

Elegance of arrangement and style is comparatively unimportant in a book of 72 pages on such disconnected subjects, but we think that Mr. Hore might have devised a more convenient mode of classifying his materials than placing the principal subjects in imperfect alphabetical order, and then adding some miscellaneous terms at the end in no order at all. Nor can we call the following description of gavelkind either elegant or clear:—

"Lands held under this denomination—which is an ancient socage tenure, and anciently obtained throughout England before 1066, but when knight's service was introduced was restrained to the eldest son for the preservation of the tenure, and still prevailing in parts of Kent, Urchenfield in Herefordshire, and elsewhere—descend equally, and are divided share and share alike, among all the male children; and in defect of these, among the female. They are of age, and qualified to take possession, at 15; and may then give, send, or alienate the same to any person without the consent of any one [and by any kind of conveyance?]. *They inherited, though convicted of felony, murder, &c.*"

On the whole we cannot say that the book is any improvement on Cowel and Spelman, and if it is not intended as an improvement on them, we fail to see its *raison d'être*.

THE HISTORY OF CRIME IN ENGLAND: Illustrating the Changes of the Laws in the Progress of Civilization; written from the Public Records and other Contemporary Evidence. By LUKE OWEN PIKE, M.A., of Lincoln's Inn, Barrister-at-Law. (London: Smith, Elder & Co.)—A History of Crime, written with a view not of satiating curiosity, nor for the gratification of a prurient imagination, but in pursuit of the knowledge of the all-important question, the Prevention of Crime, is a work worthy the author of a Prologue to authentic English history. The first volume dealing with the period from the Roman invasion to the accession of Henry VIII., and the interest sustained in this, not the most attractive time in our history, marks the work on its completion as a valuable addition to our histories, and that it should be placed side by side with the History of Civilization. The author traces "the different opinions entertained at different times of similar actions, the varying amount of respect shown for human life and property, the effects of ignorance and superstition upon the nature and number of offences, and upon the laws intended for their repression, the relation between political con-

vulsions and social disorganisation which belong essentially to the history of civilization." Why such a work has not been before attempted is thus explained: "The means of effecting a comparison between our age and another, in their criminal and social respects, cannot be found in sufficient abundance in printed books, crabbed manuscripts, often dirt-stained and half obliterated by damp, written in a hand and in a language with which the classical scholar is not familiar, must be labouriously read by him who would fill up the gaps in the story of our English life." That our author has "labouriously read" may be inferred from the extensive notes from the Hale MSS. from ancient records in the various Inns of Court, from the Petyt MSS. and other documents little known, although invaluable to the students of English history. And here we may note, that the author does not interrupt his narrative with proofs which often withdraw the reader's attention from the main point, but he has, in our opinion, arranged all his authorities far better in an appendix, which, in itself, possesses considerable intellectual *pabulum* for the curious.

The large range over which Mr. Pike takes the reader may be inferred from a few of the prominent points. Commencing with the Teutonic origin of our Criminal Law, he rapidly sketches the advantages and disadvantages from Roman conquest and culture, Roman punishments and laws. Speaking highly of the gradation of punishment introduced by the Romans, and their regard for personal liberty, he traces to them the origin of our police and guilds.

Rapidly passing through the period from the sixth to the eleventh centuries, he, in chapter 2, traces the development of the jury system and the position of the clergy. It seems strange that to a time when men's manners were so rough, that the rival Archbishops of Canterbury and York, could, without loss of respect, lead on their clergy to a band-to-hand fight at Westminster, when priests stole from one another the relics of the Saints, and when large numbers of Jews were publicly massacred, we should owe the origin of Justices of the Peace, and of attempts to suppress fraud and corruption.

Chapter five, from the black death to the accession of Henry the Seventh, is, perhaps, the most interesting to the general reader. The history of Wat Tyler's rebellion, the outcry against the excesses of the clergy, the burning of heretics, and the pitiable death of the Maid of Orleans are retold with pathos and indignation. The position of the guilds, the progress of chivalry, and the miserable condition of women are described with vigour and accuracy. We seem, in fact, to live in the times portrayed, as we follow the author in his interesting descriptions. We

look forward to the forthcoming volume in which the transition of the mediæval state of society into the state of society in which we live will be described, with lively curiosity, and we reserve to ourselves the pleasure in a future notice of dwelling more fully, and in a manner more worthy of the subject, on this most valuable and novel contribution to our knowledge of the History of England.

INTRODUCTION TO THE STUDY AND USE OF THE CIVIL LAWS. By Sir George Bowyer, Bart., M.P., D.C.L., author of Commentaries on Universal Public Law, &c. (London: Stevens and Sons, 1874.) This is a new edition of the introduction to the celebrated commentaries of Sir George on the modern civil law. It touches on matters of great present interest, and discusses, with much freshness and vigour, and (we need scarcely add) with the usual raciness of the author. We have not elsewhere seen a more correct estimate of the value of Austin as a jurist, or of Bentham as a writer upon miscellaneous legal topics; at the same time, we must be thankful amidst the general poverty of English Jurisprudence for the benefits, however small, which these two authors have conferred upon English Law Students. For an indication of the true uses to which a study of the Institutes or Digest of Roman Law may legitimately be applied, and also for a true estimate of the relative merits of the Historical and Philosophical methods of studying the same, when either of these two methods is isolated from the other, or the Historical is unduly exalted above the Philosophical, we commend the reader to Sir George Bowyer's Introduction, and to the eminent authors there quoted who corroborate the writer's own opinion. So far this edition of the Introduction ought to prove eminently successful; it is not to be expected that an introduction, more especially when it consists (as in the present case) of only 72 pages altogether, would present much abundance of detail. But for that the reader may be referred to the body of the Commentaries themselves, and should also test the details there given with the original texts of the Roman jurists, making a diligent study of the Pandects for that purpose.

HODGE PODGE : A RHYME.—(Williams & Norgate, London, 1873.)—We regret that want of space has prevented our noticing this book before; it is what its name implies—a medley. We are only concerned with those parts of it which have reference to legal subjects and pursuits. Before noticing them, however, we would mention that in the "Inquest" will be found some lines

describing the suicide of a school governess, which are only inferior in graphic power to Hood's "Bridge of Sighs." We cannot resist giving a specimen.

"And o'er her face a spirit seemed to hover;
A faint smile lingered round her lips yet sweet;
Her eyes brown lashes closed their bossy cover;
Her cheeks were firm, though pale as icy sleet;
And golden hair was knotted high above her,
In piles that, scattered, might have veiled her feet.
Oh, what a spell of marvel and remorse
Hangs for an hour o'er woman's comely corpse!"

We cannot think that it is good taste, however, in the rhyme to compare the Inns of Court Volunteers to "convicts untransported" simply because "dressed in grey drab," and this is repeated in stanzas 96 and 98, where want of valour is insinuated.

Not the least interesting part of this book is that which gives an account of the old, not the present, Northern Circuit, and it is from this portion of it that we conclude that the author is a member of the old "Northern." The Grand Court is a subject which well deserves such a chronicling as it received in these pages, and we are heartily glad to find it so well done. We fear, however, that it will only be interesting and intelligible to those who knew the Circuit during the times described. The book is very interesting, and, notwithstanding the metre rendering it at times slightly tedious, is well worth a lawyer's perusal.

THE LIABILITY OF INNKEEPERS:—By the Honourable FRED. CHARLES MONCRIEFF, Barrister at Law, (London, MAXWELL and SON, 1874.)—The very important subject of which this small handbook of sixty eight pages treats, deserves to be more carefully handled than it has been in the work before us. We have naturally some sympathy with young counsel who in their desire to make a name in the legal world, fearlessly rush into print, but we have a right to expect, that they will devote a fair amount of time and attention to the subject which they undertake to elucidate. Mr. Moncrieff has confined himself to the liability of innkeepers merely as to the goods of their guests. He goes over old ground, and displays considerable ingenuity in explaining what to minds of ordinary accumen requires no explanation. For example, in the Act of the 26 and 27 Victoria amending the law respecting the liability of innkeepers, he is most careful to interpret that the "nature of the provision" means the provision of this Act. The work is a rivulet of type through a meadow of margin. It occupies a space in our library, which might well be filled with a really valuable work, and we trust that if the author attempts a second edition he will devote some attention to recent decisions

in which innkeepers are held to be liable, not only as insurers of goods, but as victuallers under the Licensing Act. Such a treatise would be of value not only to the trade, but to the profession, and every traveller.

BRIEF SUMMARY OF THE LAW OF JOINT STOCK COMPANIES, UNDER THE COMPANIES ACTS 1862, AND 1867. — By S. H. CAMERON, Solicitor Supreme Courts Edinburgh. (Maxwell and Son, London, 1874.) This is a model volume of a practical exposition of Statutory Law. It is the autonomy of the statutes referring to this important department of commercial enterprise. No attempt is made to deal with the principles of these associations, or to treat of them in their political aspects or tendencies, or to detail the various phases of their history. The author at once plunges into the currents of legislation. He sectionally divides every step from their origin in the "promoters" to their final success in the cheerful epithets of "dividends," or the wail of misfortune in the doleful epistle of "winding up." The volume altogether is a *Handy Book* of Joint Stock Law, wherein every shareholder may find clearly detailed alike his privileges and his liabilities. If he henceforth errs he cannot longer be justified on the plea of ignorance since in this little volume he may find, without wading through manifold volumes of statute law, all he requires to know in language more simple than what bears the impress of the Queen's Printer.

A TREATISE ON THE LAW OF WARRANTIES AND REPRESENTATIONS UPON THE SALE OF PERSONAL CHATTELS. By THOS. WM. SAUNDERS, (London, Law Times Office, 1874). This little volume on an important practical subject, seems to us very well adapted for chamber use by both branches of the profession. Warranties, express and implied, always afford a large proportion of the business in London and the assizes, and a compact little work, such as Mr. Saunders's, was needed, because, as the writer fairly says, that although the subject is mentioned in some larger text books in connection with the general law of contracts, a more detailed statement of the law was needed. The full quotations given by the author from the numerous cases cited on the subject, show much diligence and care in the compilation of this treatise, and largely increases its value as an authority. The law on *implied warranties* is but little understood outside the profession, hence many merchants and manufacturers find themselves at law, for an alleged want of due care in the manufacture of an article, they are held to have given such an implied warranty

as reasonably fit for a particular purpose. There are upwards of a hundred cases cited and judgments referred to. One very useful chapter explaining briefly and clearly the law of warranties by servants and agents, and when the masters are liable for their frauds. We also note useful remarks on the question of returning goods, and rules or conditions at auctions. On the whole we confidently recommend this little book to our readers.

LAW EXAMINATIONS.

Trinity Term, 1874.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Richard Sneade Brown; William Mark Pybus; Thomas Fisher, jun.; Charles Henry Morton. The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Brown, the prize of the Honourable Society of Clifford's Inn; to Mr. Jones, the prize of the Honourable Society of New Inn; to Mr. Pybus, Mr. Fisher, and Mr. Morton, prizes of the Incorporated Law Society. The examiners have also certified that the following candidates, under the age of 26, passed examinations which entitle them to commendation:—Louis Errington Bolinbroke; John Storey Clowes; John David Davies; John Henry Flower; Charles Davidson Forster; Maurice Samuel Rubinstein; Walter Scrowcroft; John Robert Shittler. The Council have accordingly awarded them certificates of merit. The number of candidates examined in this term was 229; of these, 196 passed, and 33 were postponed.

The annual examination of students of the Inner Temple in subjects in which the tutors have given instruction during the preceding twelve months has resulted as follows. Examiners:—Hardinge S. Giffard, Esq., Q.C.; John B. Maule, Esq., Q.C.; W. W. Mackeson, Esq., Q.C.; J. F. Stephen, Esq., Q.C.; S. B. Bristowe, Esq., Q.C.; F. S. Waller, Esq., Q.C.: Jurisprudence and Civil and International Law—First prize, £20,

S. F. Harris; second prize, £12, G. E. S. Fryer and A. L. Hart (equal). Constitutional Law and Legal History—first prize, £20, S. F. Harris; second prize, £12, A. L. Hart. Real and Personal Property—first prize, £20, A. Dobson; second prize, £12, T. S. Udal; hon. mention, J. B. Porter. Equity—first prize, £20, J. S. Udal; second prize, £12, A. Birrell. Common Law—first prize, £20, J. C. Anderson; second prize, £12, J. S. Udal.

THE ELDON LAW SCHOLARSHIP.—This scholarship for the three years, commencing on the 4th June 1874, has been bestowed on Mr. John Arthur Godley, M.A., of Balliol College, Oxford. It was originated in the year 1831, in honour of Lord Chancellor Eldon, whose birthday was on the 4th June, his Lordship having been born in 1751.

APPOINTMENTS.

The Lord Chancellor has recommended the grant of a patent of precedence to Mr. Serjeant Robinson, and the appointment of the following barristers to the post of Queen's Counsel: Mr. Alborough Henniker, Mr. Talsourd Salter, Mr. Henry Rowcliffe, Mr. W. Ambrose, Mr. J. Morgan Howard, and Mr. John Edwards. Mr. Ambrose and Mr. John Edwards belong to the Northern Circuit, Mr. Henry Rowcliffe is an equity draughtsman and conveyancer, the other gentlemen belong to the Home Circuit. At a meeting of the electors of Chichele's Professor of International Law and Diplomacy, the electors being the Archbishop of Canterbury, the Lord Chancellor, the Secretary of State for Foreign Affairs, the Judge of the High Court of Admiralty, and the Warden of All Souls' College, Mr. Thomas Erskine Holland, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, was elected to the vacancy, occasioned by the resignation of the Right Hon. Montague Bernard, D.C.L. Mr. C. H. Walton has been appointed master of the Court of Exchequer.—*Scotland.*—Mr. John Miller, Solicitor General, has been appointed a Judge of the Court of Session in the place of Lord Jerviswoode resigned.—*Natal.*—Mr. Henry Conner, LL.B., one of the puisne judges of the Supreme Court, has been appointed Chief Justice of that Court.—*India.*—Mr. G. Gordon Morris, of the Bengal Civil Service, has been appointed judge of the High Court of Judicature at Fort William.

THE LAW MAGAZINE AND REVIEW.

No. IX.—VOL. III.—SEPTEMBER, 1874.

I.—PRACTICE OF THE DIVORCE COURT.

ANY book that deals with the Divorce and Matrimonial Laws must be of interest to the public generally, but to the legal practitioner such a book is of still greater interest, because, though there are already many books published on these subjects, there is at the same time an absence of general information about them. It is, therefore, with much pleasure that we take up the third edition of a work on the subject.*

The authorship of this book is divided between two barristers and a solicitor or proctor, and the excellent arrangement of their various contributions produces a most satisfactory result. The authors appear to have acted upon the saying attributed to a great man: "There are two sorts of information; one, that a man carries in his head; and the other, that he knows where to get." The introductory treatise on divorce and matrimonial law is divided into a number of clauses or sections arranged in order of their headings, and though, by reason of this arrangement, it is easy to see what is said and all that is said about each particular subject, yet such an arrangement of disconnected paragraphs is scarcely worthy of the name of treatise, and is, perhaps, to the general reader about as unpalatable a form as the matter could have been put in. The introduc-

* "A Digest of the Law and Practice of the Court for Divorce and Matrimonial Causes." By R. A. Pritchard, D.C.L. Third edition, by J. G. Witt, Barrister-at-law, and W. T. Pritchard, Proctor and Solicitor. London: Shaw & Sons, 1874.

tory treatise is, however, clearly written, and contains much interesting information.

In Johnson's Dictionary collusion is thus defined: "*collusion* is, in our Common Law, a deceitful agreement or compact between two or more, for the one part to bring an action against the other to some evil purpose; as to defraud a third of his right." The introductory treatise informs us that "the Ecclesiastical Courts intended by the word 'collusion' an agreement or plan between husband and wife that one of them should commit, or appear to commit, some act upon which the other could proceed to institute a suit. That is not the meaning in which the word 'collusion' is used in the Divorce Act, which contemplates an agreement between the parties as to the institution or conduct of the suit itself. For example, where the respondent, in pursuance of an arrangement with the petitioner, forbears to resist a false case, or puts forward an illusory defence in order to prevent detection by the Court of some bar to the petitioner's claim for relief, or in any way becomes a party to a conspiracy to obtain a decree from the Court the theory of the law is, that the parties in the conduct of the suit are at arm's length, and that although the charge made against the respondent may be true, the case of the petitioner is not to be helped by concurrent acts on the part of the respondent. The House of Lords in its practice upon Bills for Dissolution of Marriages regarded collusion in the same light as the Divorce Court now does under the statute."

We should have thought that a good deal more might have been said upon this particular subject, for, on referring to it in another part of the work, we find (p. 82) that "a decree of divorce procured by the execution of a preconcerted scheme, corruptly concocted between the parties, is a mere mockery, and leaves the wife under the marital control of her husband." (*Dolphin v. Robins* 3 Macqu, H.L. cas. 563.) The possibility of a decree of the Divorce Court being a "mere mockery" is not suggested in the treatise. Of

course this decision refers to a decree of divorce pronounced by the Ecclesiastical Court, for we presume that a decree absolute once pronounced by the Divorce Court is absolutely irrevocable, supposing no right of appeal to exist since, by 20 & 21 Vict., c. 55, s. 57, & 36 Vict., c. 31, s. 4, the parties respectively are declared to be at liberty to marry again. More might have been said, too, we think, on the subject of collusion, as being one of the principal grounds on which the Queen's Proctor can intervene. This official, whose existence and activity act as a wholesome check on any persons who may desire to dissolve the bond of matrimony, and obtain a decree from the Court for purposes which the Court does not recognise, may intervene in two capacities. He may intervene, as Queen's Proctor, to prove collusion, or he may intervene as one of the public alleging the suppression of a material fact, or other matter material to the due decision of the case. And it is with regard to this intervention by the Queen's Proctor, on the ground of collusion, that we should have thought that the subject might have been more fully treated.

Alimony is a subject of curious interest, being descended from the practice of the Ecclesiastical Courts. The Divorce Court follows the practice of the Ecclesiastical Courts, but it has also express authority under the Divorce Act to make any order for alimony which it may deem just, where the wife applies for restitution of conjugal rights, or for judicial separation. And upon all petitions for dissolution of marriage, whether the husband or wife be the petitioner, the Court has the same power to make *interim* orders for payment of money by way of alimony or otherwise, to the wife, as it would have in a suit instituted for a judicial separation.

Alimony, *pendente lite*, is usually allowed at the rate of one-fifth of the husband's net income, but when the wife has sufficient separate estate to maintain her, her claim fails; when, however, she has some separate estate, but not enough to maintain her, the Court usually allots to the wife one-fifth of the joint income of husband and wife.

The Divorce Court, upon decrees for judicial separation, allots "permanent alimony," usually at the rate of from a quarter to a third of the joint income of husband and wife, and the husband may be compelled to make a provision for the wife upon dissolution of marriage, which is commonly, though perhaps incorrectly, called "permanent alimony."

Under the head "Miscellaneous," the Acts creating and regulating the jurisdiction and procedure of the Divorce Court, are enumerated. One statement is, unfortunately, not quite correct, but that is not the fault of the author; it is "that the Divorce Court will, on the 2nd November, 1874, be merged in the 5th division of the High Court." When, however, the Greek Kalends on which this event is to take place arrive, we are glad to see that the procedure and pleading now used in the Court will remain unaffected by the Act, except so far as they may be changed by rules made after the commencement of the Act.

The section on the Marriage Law of England is extracted from the Report of the Royal Commission on the Laws of Marriage (1868), and in this the law and practice of England with respect to marriage is regarded under two divisions—(1) Marriage by the Established Church; (2) Other Marriages. For the legal constitution of a marriage, solemnized in a church, it is necessary that the ceremony should have been preceded by the publication of banns for three Sundays in the parish church or chapel, &c., of the parish, in which the parties to be married "shall dwell," or be authorized by a license or registrar's certificate. Banns are intended as a security against clandestine and unlawful marriages, yet the law has given the clergyman no express power to call for or compel any information as to the age, kindred, history, or other circumstances of parties unknown to him, except that he may require from them seven days' notice, with a statement of their names, places of abode within his parish or chapelry, and length of residence in such places of abode. No legal penalties, however, are incurred by the false statement even of any of these particulars.

A marriage, founded on banns, can only be solemnized in one of the churches or chapels in which the banns have been published, and banns can lawfully be published only in parish churches and other churches or chapels specially authorised by episcopal license or Order in Council. Licenses are of two kinds : a common license, granted by the Ordinary through his Chancellor and Surrogates; and a special license, which is granted only by the Archbishop of Canterbury. For a special license no fixed period of residence is necessary; it authorizes marriage at any hour of the day or night, at any place, whether consecrated or not, but it is only granted on special grounds, and for a large pecuniary payment. A common license may be obtained by anyone prepared to pay the fees and to declare, on oath, that one of the parties to be married has for the preceding fifteen days had his or her usual place of abode within the parish or district in the church or chapel of which the marriage is to be solemnized; that there is no lawful impediment known to the deponent, and if either party be a minor not previously married, that the consent of the proper parent or guardian has been obtained. The only penalty, expressly imposed by law for the false statement of any of these particulars, is forfeiture (to be enforced, if necessary, in Chancery) of any pecuniary benefits which the party might take under the marriage. No interval of time is required to elapse between the application and the grant of the license, or between the license and the solemnization of the marriage.

To obtain a Superintendent Registrar's certificate, the parties intending to marry must give notice to the Superintendent Registrar of each district in which they reside, accompanied by statutory declarations, stating, under pain of perjury, various particulars, more numerous and precise than those required for a church license. A notice book is kept in the Superintendent Registrar's office, in which copies of all such notices must be entered, and which is open to public inspection. For the certificate the notice must state a previous residence of at least seven days in the district, and

a copy of the notice must be "suspended in some conspicuous place" in the Superintendent Registrar's office during twenty-one successive days next after the entry in the notice book. Under the 2nd division the report treats of marriages other than those by the Established Church, and these may again be divided into two heads. 1. Marriages according to the religious usages of any other denomination. 2. Marriage by a purely civil ceremony. Whichever alternative is chosen, certain preliminary proceedings are required to be taken in the office of the Superintendent Registrar, which come in place of the banns or license of the Established Church. And the presence of a civil registrar at the solemnization of the marriage is in all cases required except when the marriage is according to the usage of Quakers or Jews. These preliminary proceedings are the same as those required for the registrar's certificate for a church marriage, and the marriage may take place either upon the certificate or the license of the Superintendent Registrar. If the marriage is to take place upon the license of the registrar the declaration must show a residence in the district for at least fifteen days next before the notice, and the license may issue on the second day after entry in the notice book. If one of the parties resides in Ireland or Scotland notice to the Irish registrar, followed by his certificate according to the Irish marriage law, or a due publication of banns in Scotland, is accepted as equivalent to an English notice and certificate. The certificate or license always specifies the place where the marriage is to be solemnized, which may be at the Superintendent Registrar's office, or a registered building, or, in the case of Quakers or Jews, a place where marriages are celebrated, according to the usages of Quakers or Jews. In all these respects, and some others, such as the place of marriage and the registration of places of worship for marriage, the law and practice is uniform for all parties whether Roman Catholics, Presbyterians, or of any other religious denomination, except Quakers and Jews.

The marriages of Quakers and Jews are subject to a peculiar legislation. The same notice is required from them, and they must, like others, be married under the superintendent registrar's certificate or license, but any place within the superintendent registrar's district in which the marriage can properly be solemnized, according to their respective usages, may be named in the certificate or license, and the presence at the marriage of their own registering officer in the case of Quakers; or of any officer certified in a particular manner to be the secretary of a Jewish synagogue, in the case of Jews, is accepted as sufficient to authenticate the contract without the attendance of a civil registrar.

With respect to minors, the law is substantially the same whether the marriage is intended to be solemnized by the Established Church or not. The consent of parents or guardians is so far required by law that the parent or guardian, by publicly forbidding the banns, or by caveat, or by entry in the registrar's marriage notice book, may prevent the banns from proceeding, or the license or certificate from issuing, or the marriage from taking place, but the marriage of a minor, if actually solemnized without the requisite consent, is valid in law. The effect of non-compliance with the legal requisites is worthy of notice. The false statements of any of those particulars, as to which affidavits or statutory declaration are required, is punishable as perjury or misdemeanour, or by forfeiture of pecuniary interests, but does not vitiate a marriage; but no evidence can be offered, after a marriage, for the purpose of showing non-compliance with the provision of the statutes as to evidence.

A marriage may, however, be a *nullity*. No want of attestation or other mere defects of form will vitiate any marriage contracted in good faith, but it may be vitiated and rendered null in law by the falsification or even by a slight disguise, through the fraud of both parties of a Christian name or surname in the publication of banns, (though not in a

license) and possibly also in a registrar's certificate. A marriage, according to the rights of the Established Church, is by 4 Geo. IV. c. 96. s. 22, null and void if the parties have knowingly and wilfully intermarried in any place other than a church or chapel in which banns may be lawfully published (unless by special license), or have knowingly and wilfully intermarried without due publication or license from a person having authority to grant the same, or have knowingly and wilfully assented to or acquiesced in the solemnization of such marriage by any person not being in holy orders. A marriage solemnized under 6 and 7 Will. IV. c. 85, is null and void, if the parties shall knowingly and wilfully intermarry in any place other than the church or chapel or registered building specified in the notice and certificate, or without due notice to the Superintendent Registrar, or without his certificate or license when necessary, or in the absence of a registrar or Superintendent Registrar when his presence is necessary under the Act.

- * As to Quakers and Jews a marriage cannot lawfully be contracted according to the peculiar usages of the Quakers except between persons both of whom are members of or (if not members) "profess with and are of the persuasion of" the Society of Friends, nor according to the peculiar usages of the Jews, except between persons both of whom are of the Jewish religion. Except in these peculiar cases of Quakers and Jews no marriage in England is liable to be held void on any ground connected with the religious belief or persuasion of both or either of the parties in whatever form, by whatever person or in whatever place it may have been solemnized.

We have abstracted thus fully from the extract of the report of the commissioners, because this gives us in a condensed form, what we may call the foundation from which the whole of the divorce and matrimonial causes practice springs.

The next portion of the book is the "Digest" of cases decided by the Court for Divorce and Matrimonial causes from the establishment of the Court in 1858, together with

some decisions of the Ecclesiastical Courts, and such decisions of the Courts of Common Law and Equity as have a direct bearing on the matrimonial law. A digest in itself is not a work requiring any particular display of talent, but it necessarily requires a good deal of labour combined with intelligence and discrimination. By the side of the great work of Fisher, the digest presents but an insignificant appearance, consisting, as it does, of less than 250 pages. The last edition of the work having been published in 1864, there is naturally a large number of cases, and much fresh matter added ; and the cases seem to have been selected with judgment, and such references as we have had occasion to refer to appear to have been carefully compared. The Digest certainly supplies a want that is felt in the profession, containing, as it does, a collection of important and useful decisions, arranged collectively under their proper headings. We venture to offer one suggestion to the learned author with reference to the Index of Cases. It occasionally happens that a counsel in Court wishes to refer to some case the name of which he is unable exactly to call to mind ; perhaps he cannot at the moment recollect the name of the petitioner, but he recollects the name of the respondent or co-respondent ; we, therefore, think that if the Index of Cases, besides giving a list of the cases in the alphabetical order of the petitioners, were also to give the cases under the names of the respondents and co-respondents, the use of the Index and Digest, as a means of quick and easy reference, would be materially increased. Such cases, for instance, as *Bedell v. Constable*, or *Bedwell v. Coulstring*, should appear under letter C as well as B, as *Constable see Bedell v.* and *Coulstring v. Bedwell.*

The next division of the work is the Treatise on Practice, and this is perhaps the most important and valuable portion of the whole. To thoroughly understand the plan upon which it is written, it is advisable to study first the "Index to Treatise on Practice." The Treatise is divided into 57 heads or chapters, and some of the chapters are .

again divided into several sections; in this way the general practice is first stated, and then the particular practice appertaining to particular suits. This is a most convenient and useful way of treating the subject, as the practitioner can lay his hand upon any subject with ease, and the student can compare the different practices and the peculiarities of the different suits. Moreover in this part are contained clear, concise, and intelligible instructions to the solicitor in the forms to be observed by him, and the preliminary steps to be taken in each stage of a suit. And we should think if these instructions are carefully attended to, the solicitor will save himself many fruitless journeys to the Registry, and the officials at the Registry will not continually have to send people away to complete their papers before the seal or signature or whatever is required can be granted. One recent regulation of the court, we should be glad to see adopted in other courts, but there might be more difficulty in the working elsewhere than in the Divorce Court where every proceeding is filed or registered and is before the Court. It is that court fees are paid by stamps, and these stamps are not affixed to the documents on which the fee is paid, but are taken to the registry together with the document and there fastened, by one of the registry officials, in a book kept for the purpose.

As the procedure and pleadings now used in the Divorce Court remain unaffected by the Supreme Court of Judicature Act, 1873, except so far as they may be altered by rules made after the commencement of the Act, and as the practice and pleading seem in some respects to resemble the new practice which is then to be established, it may not be uninteresting to our readers, if we give a general outline of the proceedings in a divorce case as we gather them from this work, taking the most simple form of case, and not going into any of the different technical questions which might arise at the various stages.

The proceedings are commenced by filing a petition in the Registry, together with an affidavit of the petitioner, verify-

ing the facts and charges alleged in the petition, and stating that no collusion or connivance exists between the petitioner and the other party to the marriage. Each allegation in the petition is stated in a separate paragraph, the paragraphs are numbered, and the whole ends with a prayer, praying that the marriage may be dissolved, or that the parties may be judicially separated, &c., and asking for the custody of the children, damages, and such other relief as may to the Court seem meet.

On filing the petition and affidavit, the petitioner's solicitor proceeds to extract the *citation* under Seal of the Court for service on the other parties, giving an address for the petitioner within three miles of the General Post Office. The citation must, when practicable, be served personally, and a certified copy of the petition, under the seal of the Court must also be served personally upon each of the parties cited. This is done by personally delivering a true copy of the citation to the party cited, and producing the original, if required, and delivering a certified copy of the petition under Seal of the Court. After service the person who effected the service endorses upon the citation a certificate of service, and the citation is then returned into and filed in the Registry. The usual time stated in the citation as that in which the party cited is required to appear is eight days. An appearance is entered by the solicitor for the party cited by his making an entry in a book kept in the Registry for the purpose, in a certain specified form, and giving an address within three miles of the General Post Office. Notice of appearance is then given to the petitioner's solicitor, and within 21 days after service of the citation the respondent files an answer in the registry, and delivers a copy of the answer to the petitioner. If the answer contains more than a simple denial of the facts stated in the petition it must be verified by an affidavit made by the respondent. Within 14 days from the filing and delivery of the answer, the petitioner files and delivers his replication in a similar manner, and the same time is allowed for any further pleading and the

same rules are observed as to filing and delivery to the opposite party. Pleadings rarely extend beyond a rejoinder. It is open to either party to plead in demurrer legal objections to the other party's charge. The Court may direct the questions raised on demurrer to be tried before or at the hearing of the principal cause. When the pleadings are concluded the petitioner, within 14 days from the filing of the last pleading, or at the expiration of that time, or on the motion day next following, should apply to the judge to direct the questions of fact raised by the pleadings to be tried before the judge with or without a jury and by special or common jury. If the petitioner applies to have the cause tried before the court itself the opposite parties or any one of them may apply and have such issues of fact heard before a jury, and the court will make an order for a special jury when requested. Damages must always be ascertained by the verdict of a jury. The additional expense of a special jury falls upon the party applying for it, unless the judge certifies at the trial that the case was a proper one to be tried by a special jury. When the cause is to be tried before a jury, the questions of fact raised by the pleadings, are briefly stated by the petitioner, and settled by one of the registrars, and when so settled are delivered out to the party depositing them, and that party must deliver a copy of them as settled to each of the parties entitled to be heard at the trial. The petitioner's solicitor, eight days after delivery of the copies of questions of fact to the opposite side, sets the case down for hearing, and pays the fees amounting to about £2 16s., and gives notice to the solicitor for each of the parties for whom an appearance has been entered. This notice is filed in the Registry. The cause will then come on in its turn, unless the judge should otherwise direct. In suits for dissolution of marriage the Court may give the respondent, establishing charges against the opposite party, the same relief to which he would have been entitled in case he had filed a petition seeking such relief. The cause having been set down for hearing, will not be called on for hearing until after ten days from the day

on which it was set down and notice given, except by consent. After trial, the registrar enters in the Court book the finding of the jury and the decree. Every decree for dissolution of marriage or nullity must, in the first instance, be a decree *nisi* only, and bears date on the day on which it is pronounced. The usual period required by statute to expire before a decree *nisi* for dissolution or nullity can be made absolute is six months, but the court has a discretionary power to accept a shorter period, but not a shorter period than three months. During this interval the Queen's Proctor or any person may intervene and show cause why the decree should not be made absolute. Applications to make absolute a decree *nisi* are made to the Court by motion. An affidavit is filed with the case for motion showing that search has been made in the Registry for the six months from, and including the date of the decree *nisi*, and that no person has obtained leave to intervene, that no appearance has been entered, or affidavit filed by the Queen's Proctor, or on behalf of any person desiring to show cause against the decree *nisi* being made absolute. Either party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage, may, within one calendar month after the pronouncing of the final decree, appeal to the House of Lords, and the House of Lords may either dismiss the appeal or reverse the decree. Supposing the decree absolute to have been pronounced, and no right of appeal to exist, the parties respectively are then at liberty to marry again, though no clergyman in Holy Orders of the United Church of England and Ireland can be compelled to solemnize the marriage, of any person whose former marriage may have been dissolved on the ground of his or her adultery, or is liable to any suit, &c., for refusing to marry such a person.

The book also contains the Rules and Regulations for the Court, an Appendix to the Rules containing the Court Forms, and a collection of Precedents in addition to those authorized by the Rules, a Table of Fees, and an Appendix containing

such portions of the Acts of Parliament relating to the Court as are in force.

In conclusion, we say that we have every reason to believe that the book will be fully appreciated by all who may use it, and that we hope that the new Rules and Orders will not necessitate many alterations in it.

II.—PETTY SESSIONS PROCEEDINGS.

THE phrase, "Justices' Justice," has passed into a proverbial signification of the absence of either law or justice. The "Great Unpaid" have, in England, immense power for good or evil, and the almost universal opinion of the public undoubtedly appears to be that the evil vastly predominates over the good. Gentlemen, without the slightest knowledge of law, and without any regard whatever to their moral or intellectual character, are put into the Commission of the Peace, from the mere fact of their occupying a station of wealth or "position" in society. It cannot, therefore, be expected that they will be adequate to the performance of duties upon which they have had no means of acquiring information. They must be under guidance. Accordingly the magistrates, as a rule, are governed in their decisions by their clerks. The Justice, who is practically irresponsible, leans upon the clerk, who is wholly so, and as a necessary consequence the most outrageous burlesque upon justice is very commonly performed at petty sessions courts. It may, indeed, be safely affirmed that on no social question whatever is reform more needed than in the administration of magisterial jurisdiction, and the Minister who will carry out an efficient reform in this respect will earn for himself an undying reputation.

The first great abuse is that magistrates' clerks are generally paid by fees, and very petty fees too, instead of by

salary, as they ought to be. There is power to commute the fees and to fix a salary in lieu thereof, and this power has, we understand, been put in operation in the county of Somerset, and perhaps some others ; but usually the clerk who has issued the summons, (for the Justice signs, as a matter of course, all that are put before him,) and who advises whether the defendant shall be convicted or not, depends upon obtaining such conviction for securing all, or part of, his fees. He, the practical judge, is practically interested pecuniarily in often times procuring a perversion of justice. It is evident that this custom must encourage informations both frivolous and unjust ; that such will often be allowed as of course, and that great wrong must ensue ; In all cases the clerks should be paid by salary, and absolutely forbidden from taking any share of the fees consequent upon the proceedings.

It is of almost equal importance that Justices should be encouraged and instructed to make themselves acquainted with legal principles—the rules of evidence, and so on ; and that they do their utmost to form their own independent and impartial judgment upon all cases brought before them, They deal chiefly with the poor, but to a poor man injustice and wrong may be ruin. The poor man cannot complain to the Lord Chancellor of improper conduct on the part of any magistrate. He is equally unable to lay his case before the Secretary of State so as to obtain a commutation of an illegal or unjust sentence. He is still more unable to purchase justice by a resort to a Court of Law. We fear, indeed, that the power of “taking a case” to a superior court, is too often turned into an instrument of oppression instead of acting as a check, as intended. The justice knows that to offer “a case” to a poor man is a farce. The clerk indeed may be glad to obtain an appeal, which secures extra fees to himself, whatever be the result, and thus the law may be practically violated with impunity by the oppressor.

We would urge upon the Secretary of State, then, seriously to consider the practicability and importance of issuing

(under the advice of such judicial assistance and authority as may be deemed expedient) a clear and concise code of rules for the regulation of proceedings, in general, before Justices at Petty Sessions; which rules should be printed and exhibited in every court house, magistrates' clerk's office, and police-station, so as to be at all times open to the public for reference. Then any gross infringement of such rules might easily be represented to the Secretary of State, and some chance afforded of obtaining justice, or redress for injustice.

At present, unfortunates who generally figure in Magisterial Courts, are no more aware than the Justices themselves often appear to be, that the accused should never be invited to plead guilty, or to convict himself by answering improper questions; nor that guilt is not to be assumed until innocence proved, but the contrary, and that the onus of proof lies upon the prosecutor. They do not know that the police exceed their duty by asking questions of the party accused, for the purpose of obtaining evidence against him. They are ignorant that all penal statutes, or judicial decisions, ought to be construed, where any doubt exists, in the manner the least unfavourable to the accused; that the evidence of interested persons should be received with great caution; that the defendant has a right (if not represented by a legal adviser) to be fully heard in his own defence, to cross-examine the adverse witnesses, and test their evidence in every possible way; that compliance with all prescribed formalities is necessary in any proceeding, &c.,; all which well settled principles should be made clear by the published rules.

Justices, again, should be instructed by such means that in dealing out punishment, mercy should enter greatly into their consideration; the object being to prevent crime, rather than to punish, or to create, criminals. And further that they have very large powers of discretion entrusted to them, so that in their decisions they should be often guided more by the spirit of the offence, or the offender, than by the strict letter of the law.

The clerk should be instructed that in his capacity of legal adviser to the Bench, he is on no account to assume the position of advocate in the case, though it may be his duty to protect the accused against violation of the rules of procedure on the part of an adverse advocate ; still less should he interfere, in aggravation of punishment, with magisterial discretion leaning to the side of mercy. That the depositions should be clearly taken down, and all legal difficulties well considered, in the first instance, rather than lightly disposed of, with a view to the promotion of "cases" for superior courts. Finally, that the costs awarded should be moderate ; neither encouraging informations, nor, by exacting extortionate fees for professional service, police or witnesses, turning the administration of justice into a trade ; for by so doing he takes the surest method to bring law into contempt.

T. B.

III.—IMPRISONMENT FOR DEBT.*

WE have received the under-noted work, which discusses the subject of imprisonment for debt with reference to its gradual and growing abolition among all civilised nations. The work passes in review the law of imprisonment for debt amongst the principal nations of antiquity ; to wit, amongst the Jews, the Persians, the Indo-Chinese, the Egyptians, the Grecians, and (more particularly) the Romans ; then proceeds in like manner with the law as it existed amongst the Franks, Goths, and other of the barbarous conquering hordes of Europe, and ends by tracing, accurately, the successive legislation upon the subject in France and England, and by indicating the present state of that legislation in France and in England, and also in Germany, Austria, Belgium, Norway, Russia, Sweden, and Switzerland.

* *Essai sur l'Abolition de la CONTRAINTE PAR CORPS.* By Henri Hardouin, Conseiller à la Cour d'Appel de Douai. Paris : Cosse, Marchal, et Billard. Bruxelles : Bruylant-Christophe et Cie, 1874.

The essay of M. Hardouin is full of the most lively interest, and shows also the most numerous traces of unremitting labour; and consequently it not only reads pleasantly and agreeably for the hour, but affords also a trustworthy and exhaustive source of information for future reference and consultation at all times of need. Nor is the work entirely an historical review; for although it is characteristically such—and the more valuable for so being—still the author has interspersed amidst his statement of the history, numerous remarks that are suggestive of the principles which from time to time have underlain and justified the successive legislations. And so far as regards the manner of expression, that abounds in felicity and brevity and wit.

But to the substance of the work: We propose to furnish a synopsis of the history, in the hope that the essay itself in its unabridged form may be perused by English, American, and other jurists; for our synopsis can at the best afford an indication merely of the character and of the merits of the work.

The primitive rule of law among all nations has been that the debtor shall answer for his debt with his person, that inability to pay or insolvency is a crime, and the insolvent little (if at all) better than a thief. The rule of law which has been accepted in modern times is the reverse of the primitive rule in all these respects; for (putting fraud aside) the debtor shall now answer for his debt with his property only and not also with his person, his inability to pay or insolvency is a civil result only, and an insolvent person is in no respect regarded as a criminal. This inversion of the law corresponds to an inversion of the morality or manners of the respectively contrasting epochs; for the laws, which are powerless to create institutions without morality as their basis, are also powerless to keep institutions alive when morality has forsaken them. Or, to quote from the speech of M. Jourdain which he made upon the occasion of the abolition of imprisonment for debt in France, in 1867, "If

you could maintain this institution during yet a few years, and keep it alive amongst your laws, you could not keep it alive amongst the manners of your people. It is a dead branch ; if you avert the axe from it, it will of itself detach and fall off from the tree." This passage expresses very aptly the lesson which the history of the institution of imprisonment for debt, as given by M. Hardouin, teaches.

Amongst the Jews, imprisonment for debt was a prevalent institution ; but among that people, the chief traces of it are to be found in the provisions mitigating the cruelty of it, e.g. in Exod. xxi. 2., " If thou buy a Hebrew servant, six years he shall serve, and in the seventh he shall go out free for nothing " ; again, in Levit. xxv. 39-47, " And if thy brother that dwelleth by thee be waxen poor, and be sold unto thee, thou shalt not compel him to serve as a bondsman, but as a hired servant ; and as a sojourner he shall be with thee, and shall serve thee until the year of jubilee. And if a sojourner or stranger wax rich by thee, and thy brother that dwelleth by him wax poor, and sell himself unto the stranger or sojourner by thee, after that he is sold, he may be redeemed again ; one of his brethren may redeem him." Similar passages will be found in Deuteronomy xv. 7-8.

Amongst the Indo-Chinese, it appears, from the digest of Hindu Law, that a creditor might adopt various modes of enforcing payment of his debt, and among them the following mode, which was called the forcible mode, namely, " he might imprison the son or wife of the debtor, or imprison his cattle, or waylay the debtor at his house, and, by means of stripes and otherwise, compel him to pay."

Amongst the Egyptians, it appears that imprisonment for debt existed before the reign of Sesostris or (as some think) of Bocchoris, for it is attributed to each of these monarchs as a signal merit that he abolished the institution, substituting for it the following institution, which it will be seen has not altogether abandoned the remedy against the person of the debtor, namely : The debtor was infamous, and, upon his death, was deprived of the rights or solaces of burial,

which to a religious people were more valuable than all worldly honours; whence it customarily happened that the debts were paid through the pious fears of the relatives of the deceased man.

Among the Greeks, it appears that the Thebans had a law enabling a debtor to deliver his children to the creditor in satisfaction of his debt; that the like law prevailed among the Athenians, but was abolished by Solon, who also (following, it is said, the law of Egypt) abolished altogether the institution of imprisonment for debt.

Among the Romans, the law of debt, as is well-known, was peculiarly severe, and remained unmitigated until a comparatively late epoch. We find in Gaius iv. 21-25, that a Roman creditor was in certain cases furnished with a mode of execution called "*per manus injectionem*," whereby he arrested the person of his debtor, and, unless the debtor produced a responsible person (*vindex*) to answer for the debt, led him to his own house and put him in chains (*domum ducebatur ab actore et vinciebatur*). A debtor who failed to pay might also be handed over to his creditor (*addictus*), and when that happened became *in mancipio*, i.e., in a condition of free-bondage, in which he differed little from a slave. The following passage from Livy vii. 19, expresses graphically, but without exaggeration, the unhappy condition of insolvent Roman debtors, "*sorte ipsâ obruebantur et nexum inibant. Deinde et qui ante nexi fuerant, creditoribus tradebantur et nectebantur alii. Fremebant se foris pro libertate et imperio dimicantes domi a civibus captos et oppressos esse.*" And Tacitus, in his Sixth Annal, alludes to this *fenebre malum* as having proved "*seditionum discordiarumque creberrima causa.*" It is this severity of the original law of debt that accounts for the expression in Justinian's Institutes iv. 6, 40,—"*Eum quoque qui creditoribus suis bonis cessit, si postea aliquid adquisierit, quod idoneam emolumentum habeat, ex integro in id quod facere potest creditores cum eo experiuntur: inhumanum enim erat spoliatum fortunâ suis in solidum damniari.*" The condition of Roman debtors was in fact such as to frequently call for the direct

interference of the State, which, in numerous instances, reduced the rate of interest by one half, as we find in Livy vi. 16, "*Haud aequè lætæ patribus, semunciarium tantum ex unciario foenus factum*," and we find the like phrase in Livy vii. 27. And by the Lex Poetelia Papinia, 323, B.C., the *nexum* was abolished at least for Rome, so that debtors could no longer, in virtue simply of their own engagements, be reduced into slavery; but imprisonment for debt under the decree or judgment of a court of justice survived that law, and the better opinion is, that the law in question did not extend to Italy until the first century before the Christian era.

Upon the fall of the Republic and the accession of the Emperors, a new application was given to the mode of execution for debt by imprisonment of the person. The farmers of the imperial taxes (*publicani*), scattered all over the Roman world, applied it in a manner which is said to have been most pitiless, and perhaps the execration which has attached, and which still continues to attach in the popular mind to the tax-gatherer, is an evidence of the relentless severity of his procedure. And imprisonment under a decree or judgment of the Courts continued under the Empire as under the Republic, with this one mitigation, that the creditor was bound to allow his debtor, when in prison, to be supplied from without with the provisions necessary for his sustenance, and exposed himself to a penal action in case he refused to do so.

With the accession of Constantine, Christianity succeeded to Polytheism as the State religion, and the influence of the bishops was extended in some instances successfully in procuring the deliverance of prisoners for debt from their imprisonment. A law of Valentinian and of Valens II. (385 A.D.) confirmed this privilege to the bishops. But subject to such occasional relaxations, the institution of imprisonment for debt remained even until the reign of Justinian, and it also survived all the legislation of that monarch. At the most the treatment of the debtor while in prison was rendered a little more humane.

With the arrival of the dark and barbarous middle ages, the severity of the primitive law of debt revived, accompanied with imprisonment and torture, and its subsequent mitigation is to be attributed to three causes, and to be distinguished by three epochs, namely, the establishment of the feudal system, the epoch of the Crusades, and the institutions of Saint Louis. It is said that the mother of Saint Louis (Blanche of Castille) procured, by her entreaties in one solitary instance, the release from the private prison of the metropolitan of Paris, of some peasant girls who were confined therein for debt. Her son endeavoured to extend this mitigation generally to deserving persons innocently insolvent. In the first place by two separate ordonnances in 1254 and 1256, he forbade the officers of his own government to apply the process of arrest to debtors either as a mode of execution for debt or as a means of compelling the appearance of the debtor in court. But owing to the weakness of his government, and to the circumstance that the great lords and the ecclesiastics exercised almost co-ordinate jurisdictions, the royal ordonnances were by no means as efficacious as their generality might suggest; indeed, it has been said that they proved entirely inefficacious. Even the trades-people of the towns claimed to assert and succeeded in asserting their right to imprison their debtors in private prisons of their own, that seeming to be the most expeditious manner of obtaining payment of their debts. And ultimately in the ordinance de Mouhous, in 1566, the right of imprisonment for debt was expressly recognised.

It was not in fact until the 18th century in France (and the same remark is true of England), that the expediency of abolishing imprisonment for debt began to be mooted. In particular, in France, by a series of decrees dated respectively the 15th September, 1791, the 15th August, 1792, and the 30th March, 1793, imprisonment for debt was abolished in all cases excepting in the matter of public accountants who were debtors to the State, but the institution was again revived in 1797 by a series of ordonnances of

that year. This wavering policy was again repeated in France about a generation later ; a decree of the 9th March, 1848, having again suspended the institution, but which was subsequently re-established. Ultimately, however, by a law of the 22nd July, 1867, the institution, after lengthened and animated debates in the Legislative Assembly and in the Senate, was abolished, and the present state of the law of France upon the matter was definitively settled, as M. Hardouin thinks ; but the law has had as yet but a short period of trial, and it is not impossible among a people so lively as the French that the settlement of the question may be re-opened, and that at no very remote date.

In England, after the efforts of Daniel Defoe, Edmund Burke, and Sir Samuel Romilly had been exerted with little effect towards the abolition, or, at all events, the mitigation of the law of imprisonment for debt ; the work was taken up by Lord Brougham about the year 1830, who demanded that the remedy should be confined to cases of fraud, contumacy or contempt, and bad faith, and not extended to the case of innocent but unfortunate debtors ; he argued that the imprisonment, while it was in no respect a satisfaction of the debt, was also both in itself and in its associations demoralizing ; the soul of man was being sacrificed to the rights of property. But the efforts of Lord Brougham were also, in the first instance, unsuccessful. The objections to the abolition of imprisonment were chiefly two, namely, that it would encourage men to break their engagements, and that it would greatly restrict commercial transactions by removing the securities for payment, and generally by undermining the confidence of traders. But more recently the principles for which Lord Brougham contended have been accepted, arrest on mesne process having been abolished in 1838 and arrest on final process in 1868, with the exceptions enumerated in the respective statutes abolishing the same, and which exceptions are in substance cases of fraud, contumacy or contempt, and breach of trust.

Upon the whole, we cannot but think that the present

condition of the law in England regarding imprisonment for debt is in a happier condition than the law as previously existing. It is true that complaints are frequently made, in particular by small traders, that since the abolition of imprisonment for debt they are constantly frustrated in recovering from certain of their customers,—chiefly migratory characters,—the amounts of their bills; but the generality of these cases being cases of fraud, it does not seem that the complaint is well founded. And at any rate the general good greatly counterbalances the particular evil; nor is the particular evil that is complained of very deserving of redress, being as a rule incurred by the sufferers themselves through their own imprudence.

We will conclude by again recommending M. Hardouin's essay to the critical consideration of English, American, and other jurists,—and also to statesmen, as treating of the question in the most exhaustive manner, and also according to a method which as combining the historical with the philosophical is calculated to exclude error in the survey and to carry conviction to the understanding of the reader.

IV.—INTESTATE SUCCESSION.

By JAMES R. PEARLESS, LL.B., Attorney-at-law.

THAT there are certain natural unalterable distinctions between property in land and property in personalty, is a self-evident fact. The object of this paper is to enquire why, in one most important respect, an unnecessary and accidental distinction should, in our law, be maintained. We approach the subject with humility and much hesitation. The burden of proof rests with those seeking alteration. The preface to a book of high authority well says, "Common experience sheweth, that where a change hath been made of

things advisedly established (no evident necessity so requiring) sundry inconveniencies have thereupon ensued; and those many times more and greater than the evils that were intended to be remedied by such change."

The alteration advocated is of considerable consequence it is true, but would introduce no new system—would create, it is submitted, little or no difficulty. We find two concurrent systems of intestate succession. Our proposal is to maintain that to personalty intact. Its rules are well-ascertained, its fairness undoubted. The Act under which to this day the next of kin take, has been scarcely touched since its passing two centuries since. And why is this? Because the table of distribution contained in it owes its origin to the united wisdom of ages. Mr. Justice Williams, in his treatise on the Law of Executors and Administrators, says that it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before. Justinian's laws were known or heard of in the Western parts of Europe. However, that author admits that it bears some resemblance to the Roman law of succession, *ab intestato*, and was penned by an eminent civilian, Sir Walter Walker, which circumstances, he says, gave rise to the notion that the Parliament of England copied it from the Roman *prætor*. Possibly the Roman element is larger than either Mr. Justice Williams or the Parliament which passed the Act, thought. The more Roman law is studied the more evident does it become that our early judges and legal authors (Bracton, for instance) were well acquainted with it. In early times, in England, personalty was little regarded, and it is hardly likely succession to it was then reduced to such a beautiful system. With the Romans, on the other hand, there being no distinction between succession to land and that to goods, and add to this not so much freedom in making wills, their one system was worked out to perfection. However, whether the origin be early English or

Roman, we establish our point, that our present system of intestate succession is, in the case of personalty, of most respectable antiquity. Let us suppose it to be based on the united wisdom of England and Rome.

Now, in succession to real estate we find neither the same fairness nor the same symmetry, and, we may add, not the same antiquity. We have, in a former paper,* discussed the subject of special customs of descent to this day prevailing. For our present purpose we do not lay much stress upon this fact. It is an accidental, not a necessary distinction. The special customs might be abolished and real succession, as distinguished from personal, still remain. So long, however, as these special customs do exist, there cannot be a perfect symmetry. Then with regard to the antiquity. Any reader of our early history is aware, that it was long unsettled whether, on the death of a Sovereign, a brother of full age was to be regarded exactly in the light of an usurper in ousting an infant son. And, in somewhat later times, in our early wars with France, claims were asserted which a conveyancer would now, in a moment, pronounce to be utterly untenable. Important alterations were made as recently as in the last reign. A layman of the present day can scarcely credit the fact that, until then, if an owner died leaving no other relative than his father, the Crown was entitled, and from the pure fiction that an estate could not ascend. The one great characteristic of our real succession, we admit, has long prevailed. That characteristic is primogeniture, which brings us to the question of fairness.

Where there is a peerage or baronetcy to maintain, and in many other cases, especially of ancient families long rooted to the soil, primogeniture is an excellent institution. In these instances, however, the devolution of the estates is not left to operation of law, but is made to depend on settlement. Title by descent is most rare. There is a triple chance

* On Uniformity of Descent. *Law Magazine and Review*, October, 1872.

against it. A settlement creates entails which can be readily barred on the eldest son coming of age. The eldest son on his marriage usually joins with his father in nominally barring these entails, but by the same deed, to all intents and purposes, makes them obligatory for another generation. There is a second chance against title by descent operating, for the eldest son may neglect to resettle. If he neglects to resettle he is almost certain to also neglect (and purposely) to bar the original entails, under which the estates will still consequently devolve. There is a third and last chance, that should he bar them without resettling, it will be in his power to make a will, and this power he may exercise.

The truth is, primogeniture exists in this country rather as a custom than as a law. Certainly, to a very small extent, the fact that our law upholds primogeniture does aid the custom. But were the law altered public opinion would still support and encourage the existing system in the cases we have alluded to, and others where appropriate. No one would advocate the alienation of the old baronial hall from the barony. The sole difference would be that such an owner in the rare case of finding his lands not in settlement would have to take care to make a will giving them to his eldest son.

Let us be clearly understood. We in no way make a grievance of primogeniture. If there were no power for an owner to make a will there might be one, but there is such power. If, then, title by descent is rare and in the preceding owner's power to avoid, why trouble to do away with it? We reply, that so long as human beings are human beings there will be instances of carelessness. Men will omit to make wills. Law should in such cases exercise its paternal jurisdiction by making for the deceased owners as good wills as they could have made for themselves.

We have said that with the great, for whom primogeniture is a good thing, it would still exist were the law altered. With the small it is that the few cases of title by descent are found. In almost all these instances, this is the result

of sudden death without a will. A mechanic, perhaps a bricklayer or carpenter who can build cheaply, saves a hundred or two, and buys a piece of ground, borrows another two or three hundred, and gradually pays it off. The will of such a man almost invariably directs a sale and division of the proceeds. The omission to make such a will we consider law should supply. We do not propose that the land should be divided as such, but that the administrator should sell it and divide as money. On the minor ground of simplicity and saving expense there would often be a considerable gain. A purchaser would then look merely to the letters of administration. Under the present system, to prove descent of such a near relative as a nephew from an uncle it is necessary to show the marriage of the nephew's grandfather, and, if not described in the register as a bachelor, that he had not had a son by a former wife; the birth of the nephew's father, and that he was the eldest son, or, if other sons older, that they have died childless; the marriage, and whether first marriage, of such nephew's father, and the birth of the nephew himself, and that if any older brother he has died childless. In addition to this the birth of the deceased uncle, and that he has died childless and intestate. Also points of dower. The difficulty may be increased by the rule which, contrary to the recommendation of the Real Property Commissioners, prevails, that title is to be traced from the purchaser. Possibly the deceased uncle may have taken the estate by descent from his mother, in which case we shall have to look for another heir than the nephew whose pedigree we have traced. Then, when we have found him, the heir to the little estate, perhaps two or three cottages, may be a young child, and thus no one in a position to sell.

There is another strong reason for having but one method of succession. It is sometimes difficult to draw the line between realty and personalty. There must be points of contact and consequently of *doubt*.

Again, a man enters into a binding contract to sell an

estate. From the very moment of the contract, unless he has made a will (and in most wills a blending is very desirable), he entirely alters the course of devolution. This, probably, without giving the matter a thought.

Again, under the change we advocate, there would practically be no distinction between long leaseholds without rent and freeholds—a great boon.

Another very troublesome rule occurs to us. If an owner grants a lease with a purchasing clause, and then dies intestate, it is in the power of the tenant, it may be years after the landlord's death, to elect to buy. It is left to depend entirely upon whether the tenant, who is a mere stranger, buys or not; whether the eldest son shall keep the estate; or whether the proceeds shall go to the next of kin. Nor can the ownership be determined until either the lease runs out, or the tenant exercises his option of buying.

We think we have shown that there is nothing revolutionary about our proposal, and that in the few cases where it would operate it would be a benefit. •

We do not attempt to prevent lands being left to the eldest son, or to interfere with heirship so far as entail is concerned. Our only contention is that one system of intestate succession is better than two, and that if the owner of an unsettled estate, whether technically purchaser or not, dies intestate, the law should make for him such a will as he would undoubtedly have made for himself. If only one next of kin, he could elect to take as land. If a child wished to buy the homestead, he could let another child administer, and buy, taking care to give a full value. Indeed, this should be encouraged. But the chances are, the real property of the father would not be the homestead at all, but merely cottages bought as an investment. * If more than one next of kin, there ought to be a sale either to one of the family or a stranger, unless special circumstances render it undesirable. It is impossible by law to provide for everything. Those special circumstances the deceased owner ought to have considered and provided for by will. After all, in the

words added by Dr. Johnson, for Goldsmith, to his "Traveller"—

"How small of all that human hearts endure,
That part which kings or laws can cause or cure."

But this should not discourage legislators from doing their best. Our only and great hesitation is about interfering with time-honoured traditions. The sale of land is, however, so often made on death by trustees, under a will, and who are usually the same persons as the executors, that we do not think the public opinion of the general community would sustain a severe shock, perhaps no shock at all. And should this paper be perused with aversion by any country gentleman who, following the directions of the great Blackstone, takes an interest in the laws of his country, and evinces it by reading the pages of the now venerable *Law Magazine*, we shall gladly welcome a reply. If he can show that the stability of the constitution rests upon primogeniture—as a *law*—a law seldom called into operation, and then only by accident—we shall be only too glad to be convinced that the old paths are better.

V.—ARRANGEMENT OF THE LAW OF PROPERTY.

(Continued from the May number, page 435.)

TO the criticism which appeared in this Magazine, a few months ago, of some of the terms and distinctions of the English Law of Property, it is here intended to add some suggestions for a re-construction and re-expression of that department of the law. The task may appear presumptuous, for the system attacked is by many persons regarded as a fabric too venerable and too sacred to be touched by the profane hand of reform. Indeed, there are not wanting those who, thinking with Blackstone, that "everything is as it should be," look upon any attempt at amendment as an act

of desecration, even a species of sacrilege. Merely to attack is, no doubt, pernicious. To advocate demolition without being prepared with a plan for re-building- can never be justifiable. To preserve carefully what we have until we can get something better is only what human nature dictates. But, on the other hand, it is not less incumbent on those who see, or fancy they see, evils, and who can, or fancy they can, suggest improvements, to point out the supposed evils and suggest the supposed improvements. It is only just, therefore, that an attack having been made on the terminology and arrangement of the English Law of Property, an attempt should be made to justify that attack by proposals for superseding the established terms and distinctions by better. A few suggestions for improvement are, accordingly, here offered. They are merely intended as suggestions, and by no means as embodying a formal plan of re-construction.

“Confused” and “complicated” are the epithets with which the existing arrangement has been branded; and the grounds of the accusation have been given. The desired end is to effect a metamorphosis; on the ruins of the confused mass to erect a harmonious system; to replace complexity by simplicity. To the attainment of this end it may conduce somewhat to examine the causes of the evils complained of, in order that, in the work of reconstruction, they may be avoided.

Of these causes the principal seems to be technicality. A purely technical and artificial arrangement, such as the distinction between realty and personalty, is very objectionable. It is necessarily arbitrary. The various subjects of the opposed classes have nothing naturally in common. They are of a miscellaneous and heterogeneous character. A technical arrangement, as Bentham observes, is a sink that will, with equal facility, swallow any garbage that is thrown into it. It moreover tends to injure the reputation of jurisprudence in the estimation of the public, and to produce, says Bentham, a popular idea of the law similar to that which Selden entertained with regard to the personages of

antiquity. He, when a schoolboy, hit upon the whimsical notion that with regard to Cæsar and Justinian and those other personages of antiquity that gave him so much trouble, there was not a syllable of truth in anything they said, nor, in fact, were there ever really any such persons; but that the whole affair was a contrivance of parents to find employment for their children. "Much the same sort of notion," suggests the great Jeremy, "is that which technical arrangements are calculated to give us of jurisprudence, which in them stands represented rather as a game at crambo for lawyers to whet their wits at, than as that science which holds in her hand the happiness of nations"—(Preface to *Fragment on Government*). To cram the subjects of opposed classes into their respective places in order to make them fit in with a preconceived, or more frequently an accidental, arrangement, instead of the arrangement being suggested by and framed to meet the nature of the subjects, cannot but produce intricacy. The object of classification is simplicity, and to attain this its proper end, a classification should be natural, that is to say, suggested by the nature of the subjects classified. A body of law is likely to be well or ill arranged in the ratio in which it approaches or recedes from that ideal. To substitute, then, for the technical divisions of the English law a natural and simple arrangement should, it is conceived, be the primary object of reconstruction.

Another of the causes of the intricacy of our Law of Property appears to have been the absurd method of altering the law by means of legalised evasion, a process of effecting change which has been frequently adopted. A law deemed to be obnoxious, or to produce inconvenience, is nevertheless allowed to remain on the statute book, while the required remedy, which might have been wrought with ease and simplicity by repeal of the statute, is obtained by evading it. Two notable instances of this are afforded by the history of the law of entail, and of the mode of conveyance, known by the name of "Lease and Release." Entails were established in the reign of the first Edward by the statute *de donis*

conditionalibus (13 E. I., c. 1.), for the purpose of remedying what was then thought to be an evil, the alienation of an estate by a person to whom it had been given to be enjoyed by him for life, and after his decease by his children. It was enacted, therefore, that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed, so that they to whom the tenement was given should have no power to alien it whereby it should fail to remain unto their own issue after their death, or to revert to the donor or his heirs, if issue should fail. By virtue of that enactment may an entail be still apparently perpetuated, for the statute to this day remains part of our law. Yet what is the fact? As everybody knows, an entail may be destroyed with the utmost facility; in spite of the statute an estate tail may, at the pleasure of the tenant in tail, be converted into an estate in fee simple. The causes which led to this result are thus recorded. When the statute began to operate, the inconvenience of strict entails became felt; children grew disobedient when they knew they could not be set aside, farmers were deprived of their leases, creditors were defrauded of their debts, and innumerable entails were produced to deprive purchasers of the land they had fairly bought. It is not surprising, then, that a repeal of the statute was sought for, but it was sought for in vain. The legislature remained obdurate, and the enactment has descended to our own time. So the remedy which could not be obtained by direct legislation was supplied by judicial interposition. The solemn juggle of fines and recoveries was made available for barring entails, and the desired end was thus obtained by means of an evasion. That a redress of what was deemed a grievance should have been accomplished covertly and indirectly when it could not be obtained legislatively, is not, perhaps, surprising, but it is indeed strange that, after the practice of barring entails should have become firmly established, the statute thus notoriously and palpably evaded should have remained unaltered; and still more

strange that the act abolishing fines and recoveries and substituting "more simple modes of assurance," should have proceeded in the same way and have sanctioned by legislative authority, through the instrumentality of simpler means, what cannot be called anything but a deliberate evasion of the statute. Is the enactment obnoxious? Then let it be repealed. But to allow it to remain and yet defeat its object indirectly, whether judicially, by fines and recoveries, or legislatively by "more simple modes of assurance," is certainly a bungling way of doing business, and speaks rather unfavourably of the English methods of law-making.

Another example and one not less palpably an evasion of law was the conveyance by "lease and release." The policy of the feudal law required a transfer of land to be open and notorious, and to that policy may be attributed the requirement that the feoffee should make an entry on the land. But the policy of notoriety appears to have been unpopular; and much ingenuity was expended in devising means whereby secret conveyances could be made, which should be effectual without the completion of entry. Before the Statute of Uses, this desired object could be accomplished only in respect of equitable estates. After the statute, it was found that entry could be dispensed with also in the transfer of the legal estate, by resorting to a "bargain and sale." This, in equity, *i.e.*, the mere bargain to sell and payment of the purchase money, was sufficient to transfer the beneficial interest, the Court of Chancery considering that as soon as the purchase money was paid, the purchaser was entitled to the land, and that the vendor must accordingly be "seised" to the use of the purchaser. The effect of the Statute of Uses was to add to the "use" of such purchaser the legal estate; and the legal estate was consequently held to pass by the mere bargain and sale. But before a year had elapsed notoriety was sought to be again established by the statute 27 H. VIII. c. 16, which required every bargain and sale of any estate of inheritance or freehold to be made by deed, and to be enrolled. This is still the law; yet for more than

200 years, and in cases innumerable, was "bargain and sale" employed as a means of dispensing with the necessity of entry, and nevertheless without enrolment of the deed. The evasion of the statute was accomplished thus. The Act speaks only of estates of inheritance and freehold. A bargain and sale of lands for a term of years, therefore, did not fall within the words of the Act. It was seen accordingly that by making a lease to a man for a short term, and thus giving him the legal possession without entry or enrolment, a release of the fee might afterwards be made to him simply by deed. The method adopted, consequently, was to make a bargain and sale for a year, followed by a release of the fee, a mode of conveyance which, under the title of lease and release, continued in use till the present reign. The statute requiring enrolment was thus deliberately and manifestly evaded, a phenomenon no less strange than the process of barring entails in defiance of the statute *de donis*. If the requirement of enrolment was undesirable, why could not the statute be repealed and unenrolled conveyances of freeholds be made openly and directly? If, on the other hand, notoriety was expedient, then why conveyances should be allowed to be made in this indirect method, palpably in evasion of the statute, when the policy of requiring enrolment might have been carried to its legitimate consequences by an amending Act, including terms of years within the statute, is inexplicable.

Were it necessary to illustrate further this process of legalised evasion as an agency in law-making, other striking instances might be obtained from the history of the Statute of Uses. But the foregoing examples sufficiently illustrate how amendment by judicial interposition has produced complexity. Much intricacy has also resulted from the amending Acts of the legislature itself, where Parliament has deigned to reform. For instead of embodying in the new Act so much of the amended Act as remains law the old statute to appearance still continues in force, and the law has to be got at by piecing together several different statutes—

a process of "patchwork" legislation, as it is often called, which was thus ridiculed by Sheridan in a parody on "the House that Jack built." "First comes in a bill imposing a tax,—and then comes in a bill to amend the bill that imposed the tax; and then comes in a bill to explain the bill that amended the bill that imposed the tax; next a bill to remedy the defects of the bill that explained the bill that amended the bill that imposed the tax; and so on *ad infinitum*." The only way out of the confusion is to mould the whole of the law of property into a single enactment. Without this, reconstruction would be hopeless.

A third cause conducing to the same undesirable end has been the double ownership represented by legal and equitable estates. Confusion must necessarily exist where a man who has in one court a valid title should be held in another to have no title at all. The distinction has nothing to do with the existence of trusts which could live and flourish a great deal better without it. It is a strange anomaly that a trustee, who in one court is regarded merely as a trustee, should in another be looked upon as the true owner; while the *cestui que trust* whose interest in the former court is everything, is not even recognised by the latter. Having regard to the mode in which law has been made in England the phenomenon is intelligible and in perfect accordance with the rest of the system; but its history has no justification to offer for it. It is now almost universally condemned, and its elimination might be achieved without any one being greatly shocked. The simplicity which would result from that fusion of Law and Equity for which the Judicature Act has prepared the way, would be nowhere more preceptible than in the Law of Property.

Such seem to be some of the causes to which the complexity and confusion of the Law of Property are assignable. If they have been rightly described, it may be concluded that the aim of reconstruction should be a single enactment, embracing the whole of the law, and founded upon a natural arrangement.

The all-important question is that of arrangement. The vices of the present primary division into realty and personalty have been pointed out. Both the phraseology and the distinction should be discarded. Nor does there seem any need to substitute any other division of the same kind. A division of things based on the physical difference between moveables and immoveables is natural and simple. But is there anything in the physical distinction to justify its adoption as a legal distinction? Not necessarily. There is no necessary reason why there should be one law for moveables and another for immoveables. The same modes of property might exist indifferently in both; and the same methods of transfer established. It has been shown (in the previous paper), that in English law the difference between moveables and immoveables has no legal consequence, both moveables and immoveables being found in each of the opposed classes of realty and personalty. Nor does the Roman law afford any ground for treating moveables and immoveables apart. In the later Roman law there is no division of law founded on a classification of things, a fact, the importance of which will be seen when it is remembered with what tenacity the old distinction between *res mancipi* and *res nec mancipi* was adhered to. The fate of that ancient classification is instructive. As Mr. Maine points out, it is the type of a class of distinctions which run through the whole mass of commodities, placing a few of them in a class by themselves, and relegating the others to a lower category. "The *res mancipi* of the old Roman law were land, slaves, and beasts of burden, such as horses and oxen. It is impossible to doubt that the objects which make up the class are the instruments of agricultural labour, the commodities of first consequence to a primitive people. Such commodities were at first called emphatically things or property, and the mode of conveyance by which they were transferred was called a *mancipium*, or *mancipation*, but it was not, probably, till much later that they received the distinctive appellation of *res mancipi*, things which require a *mancipa-*

tion. By their side there may have existed or grown up a class of objects for which it was not worth while to insist on the full ceremony of mancipation. It would be enough if, in transferring these last from owner to owner, a part only of the ordinary formalities were proceeded with, namely, that actual delivery, physical transfer, or *tradition*, which is the most obvious index of a change of proprietorship. Such commodities were the *res neo mancipi* of the ancient jurisprudence, 'things which did not require a mancipation,' little prized probably at first, and not often passed from one group of proprietors to another. While, however, the list of the *res mancipi* was irrevocably closed, that of the *res neo mancipi* admitted of infinite expansion, and hence every fresh conquest of man over material nature added an item to the *res neo mancipi*, or effected an improvement in those already recognised. Insensibly, therefore, they mounted to an equality with the *res mancipi*, and the impression of an intrinsic inferiority being thus dissipated, men began to observe the manifold advantages of the simple formality which accompanied their transfer over the more intricate and more venerable ceremonial. The inferior kinds of property were first, from disdain and disregard, released from the perplexed ceremonies in which primitive law delights, and then afterwards, in another state of intellectual progress, the simple methods of transfer and recovery which have been allowed to come into use serve as a model which condemns, by its convenience and simplicity, the cumbrous solemnities inherited from ancient days." Such is the concise account of the character of that celebrated classification given by Mr. Maine in his work on Ancient Law. In modern times the same notions of superiority and inferiority have appeared, the superior classes being 'immoveables, the inferior moveables; and the result has been the same—the law relating to the superior class has been absorbed into the law relating to the inferior. "The history of property on the European continent," says Mr. Maine, "is the history of the subversion of the feudalised law of land by the Romanised law of

moveables. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly accomplished, and in England it is visibly the law of personalty which threatens to absorb and annihilate the law of realty."

An arrangement, then, founded upon a difference in the physical nature of things seems to be condemned by history. If instead of the things which are the subjects of rights, rights themselves be taken as the basis of arrangement, a division may be obtained at once natural and of practical consequence, that, namely, so strongly insisted on by Austin, into property and servitudes. There is a clear and characteristic difference between a right, which like any of the "estates" in land, confers on the party entitled to it a power of user which is undefined and cannot be circumscribed, and a right which confers on the party entitled a power of user which is exactly defined or circumscribed, as a right of way. A right of the latter class, a servitude, gives to the entitled party a power of applying the subject only to an exactly determined purpose; a right of the former class, a right of property, gives to the entitled party a power of applying it to all purposes *savo* such purposes as are not consistent with his relative or absolute duties. This important distinction between rights has been too little regarded by writers on English Law. Easements have not been distinguished from rights of property directly and upon the basis of this difference. They are, it is true, to be found placed in opposed classes, but the ground of their opposition has not been this characteristic difference. They have been separated under the names of "corporeal" and "incorporeal" hereditaments—an absurd and misleading division in which the real difference between property and servitudes is not only not brought into play, but altogether concealed. To abolish the terms "corporeal" and "incorporeal" hereditaments, and to substitute a division founded upon and so expressed as to indicate the distinction between rights which are exactly defined and circumscribed, and those which are

not, 'would tend greatly to simplicity. There might be some difficulty about terms. "Easement" is perhaps not comprehensive enough to include the whole of the subjects of the class opposed to "property," and the word servitude is not free from objection. Perhaps a more significant and appropriate word might be coined. For the present, the distinction may be marked by the usual terms of writers on jurisprudence—property and servitudes.

The subdivisions of "property," in this, its specific sense, next claim attention. First, the "tenures" and "estates" of English Law must be disposed of. This may easily be done. Tenure as regards freehold estates is practically obsolete. The distinction between freehold and copyhold tenure is of practical consequence, but it is a distinction which might nevertheless be abolished with advantage. The process of enfranchisement has received considerable legislative encouragement; and to abolish copyhold tenure entirely, would only be to carry out the policy which has been initiated to its legitimate consequences. We should then be rid of all the antiquated remnants of the effete feudal system, and be free to reconstruct the property department of the law in a manner more consistent with modern ideas, and in an infinitely simpler method.

As to "estates," considerable alteration would be necessary, both as to their terminology and their nature. The various modes of property, whether in land or goods, may be accurately enough divided into absolute and limited, the term "absolute" being used to signify the largest interest which the law recognises in the subjects of property; and "limited," all other interests. Absolute property would include, therefore, the present estate in fee simple and ownership of goods. The term "fee simple" might be conveniently expunged, as being now of no significance. The mode of property which it designates has no practical traces of the ancient fee left. Whatever remnants there are of the feudal system—theoretical rather than real—might be justifiably abolished as at variance with existing practice, and

the term itself superseded by the more significant expression, "absolute property." It may be said that there is no such thing as absolute property, restrictions being necessary to prevent abuse of the right—e.g., "*sic utere tuo ut alienum non laedas*." Of course such restrictions are necessary, being among the "sacrifices of security to security," to use Bentham's expression, which are essential to the very existence of security. But the term absolute may fairly be used not as meaning "unrestricted," but as "least restricted"—the largest interest the law recognises.

The next estate to be noticed is that unreasonable creation of the law known by the name of "estate tail," an estate which, for the many evils which have been wrought in its name, and the disgrace it has brought on the law of conveyancing, ought to meet with universal execration, and be put to an ignominious death. Its existence, in spite of the authorised modes of defeating it and in contravention of the policy of the law against perpetuities, without there being the slightest utility in it, is inexplicable. Why, instead of abolishing an institution in no way beneficial, evasion of it should have been tolerated by means of a process so disgraceful as that of common recoveries, and still more curiously, why an Act of Parliament should be passed to simplify the means of barring entails, instead of abrogating them entirely, is a problem which history does not solve. It is an estate for which, in the present condition of our law there is no place. It accomplishes nothing that could not be accomplished quite as well without it. Its place in settlements might be supplied by a fee simple. It is used only for the purpose of keeping an estate in the family. But what does it towards this end which an estate in fee simple could not do? A tenant in tail may, at any time, whether in possession or not, bar his issue. It is only in the event of his not barring the entail that the estate descends. But so does an estate in fee simple, if not disposed of. The only difference is that enrolment is necessary to effectuate the alienation of an estate tail, and that a conveyance of the

fee simple may be made without enrolment. The consent of the "protector" is required merely to enable the tenant in tail to bar remainders, and only for this purpose when the estate is not in possession. The estate is a most anomalous phenomenon from which the law cannot be too soon relieved.

Under the head of "limited property" fall the interests in land, called estates for life, and terms of years, and the lesser interests in moveables. The absurdity of opposing estates for life and estates for years as realty and personalty; and further of calling the former an estate of freehold, the latter less than freehold, was noticed in the former paper. The difference between them is merely a difference of duration; the duration of an estate for life being undefined, that of a term of years necessarily definite. There is nothing in this to produce practical consequences.

Passing by, as of little importance, the tenancies at will and by sufferance, the whole of the Law of Property it is conceived might be embraced in the following simple arrangement:—

PROPERTY:—

Absolute :

Limited :—

Rights of indefinite duration = for life

Rights of definite duration = for specified period

SERVITUDES.

This it is humbly submitted will bear a favourable comparison with the established arrangement, viz : the following cumbrous classification :—

REAL PROPERTY :—

Corporeal hereditaments :

free socage tenure :

estates of freehold :—

fee simple.

fee tail.

for life. ‘

estates less than freehold :—

terms of years.

estate at will.

tenancy by sufferance.

copyhold tenure :

miscellaneous tenures :

grand and petit serjeantcy.

gavelkind.

borough-English.

ancient demesne.

Incorporeal hereditaments,

PERSONAL PROPERTY :

terms of years in land.

goods and chattels.

So far, only a very general sketch of the arrangement of the Law of Property has been attempted. The further treatment of the subject must be reserved for a subsequent paper.

A very general sketch of the arrangement of the Law of Property is all that has here been attempted. To point out in detail the many defects of the existing system and suggest all the improvements which seems desirable would require a considerable volume.

W. W. A. T.

VI.—THE RIGHTS OF NAVAL WARFARE.

THE following is a copy of a letter addressed to the Right Honourable the Earl of Derby, Her Majesty's Secretary of State for Foreign Affairs, by Mr. H. N. Mozley, Barrister-at-law, on the subject of the Belligerent Right of Capture in reference to the Conference now being held at Brussels, on the Rules of Military Warfare:—

MY LORD,

The Congress which has been summoned at the instance of the Russian Government to meet at Brussels for

the purpose of entertaining proposals for mitigating the horrors of war, offers a convenient opportunity for the agitation of a question of peculiar interest to this country, and warns us also of a very serious danger. I allude to the importance of maintaining so far as it exists, and of re-establishing so far as we can practically do so, the ancient belligerent right of capturing on the ocean the private property of an enemy, wherever found. The danger is the loss of the remnants of the right which already exist.

The ancient and wholesome doctrine with regard to war (which doctrine obtains in a great measure up to the present day), was, that it is not merely war between two Governments in their political characters.

"Every man," it is said, "is, in judgment of law, a party to the acts of his own Government, and a war between the Governments of two nations is a war between all the individuals of which the one, and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society."*

* And the writer proceeds to illustrate his meaning by reference to the rules of International Law with regard to the capture of enemy's property, by land and by sea. War, then, implies attacks upon property as well as upon persons; the capture of the enemy's goods as well as the slaying of soldiers in the field. One is not a means to the other, but both are means to the same end—which is to compel the enemy to submission to the demand on the refusal of which the war is based. This, then, being the end of war, it will obviously be a greater gain to humanity if this is effected by the seizure of property than by the slaughter of men. The losses of the merchant or shipowner are not for a moment to be compared with the sufferings of the wounded, or with the premature loss to the State of its best and bravest men. Again, the losses of the merchant or shipowner, if unduly and exceptionally grievous, may be wholly or partially repaired by the State of which he is a member. No power on

* Kent's Commentary on International Law; p. 192 in Dr. Abdy's edition.

earth can restore to a family the loss of its member, or to the wounded and mutilated their health and vigour. Again, losses by capture of private property at sea, so far at least as they are exceptional, will generally fall upon wealthy traders who can very well bear them. And if such losses are to be apprehended, it is always easy to guard against them by proper insurances. Indeed, the moral principle involved in this whole question is a most serious one. It is of the utmost importance, unless we would abandon all pretensions to honour, patriotism and humanity, that the discomforts of war should not be borne by combatants alone, but should be diffused, as far as possible, throughout the entire community. Especially is this necessary in a country where political rights are widely diffused throughout all classes. Thus, every man who has anything to lose will be the more induced to hesitate before giving his voice for letting loose this terrible calamity among the nations of the world. There will be the less danger then of nations going to war with a light heart, and less likelihood of unjust and unnecessary wars. And if it be the deliberate conviction of a nation that a war upon which it is entering is just and necessary, then it becomes most incumbent upon all classes to feel that a grave crisis has arrived, and that it is the duty of all to unite in presence of a great national peril, and to have no interest but that of their common country.

Mr. J. S. Mill, in a speech delivered in the House of Commons on the 5th of August, 1867, observed* :—

“It would be a strange gain to humanity if the merchants, manufacturers and agriculturists of the world lost nothing by a state of war, and had no pecuniary interest in preventing it except the increase of their taxes—a motive which never yet kept a prosperous people out of war. . . . How war is to be humanised by shooting at men's bodies instead of taking their property, I confess surprises me. The result would be that, as long as the tax-payers were willing, or could be compelled by their Governments to pay the cost of the game, nations would go on massacring one another until the carnage was stopped by sheer impossibility of

* *Hansard's Parliamentary Debates, 3rd Series, Vol. 9, cols. 881, 893.*

getting any more soldiers to enlist, or of enforcing a conscription. That would be the amount of gain to humanity."

And on the same occasion Lord Selborne (then Sir R. Palmer) observed† :—

"The notion of a mercantile peace, of exempting the commercial interests from the calamities of war, was one which might have some seduction for the mercantile interest, but which, when we were at war, we must renounce. Then all classes must throw in their stake together, all must bear the common burdens, and it would sap the very life-blood of the nation if we were for a moment to admit that the trade of the country could remain at peace whilst the nation itself was involved in hostilities."

Nor is it out of place here to observe, that traders of a certain class have a direct pecuniary interest in a state of war, owing to the demand thereby created for their wares. As to the risks of capture, they are slight, and easily covered by insurance.

At this point I cannot help adverting to the absurdity of distinguishing, for belligerent purposes, "public" from "private" property. The distinction is one which has reference to the municipal law of the State affected. If a private individual suffer in his property, it is quite competent for the State to compensate him out of the public purse. If public property is taken, compensation may and probably will be exacted in the shape of taxation from individuals. Public property is only another name for property belonging jointly to the private individuals, whose aggregate makes up what is called the public. The adjustment of burdens and benefits as between one citizen and another, and as between "the public" and "private individuals," is a matter to be regulated by the municipal jurisprudence of the State concerned. With such a matter the other belligerent can have nothing to do. If war is indeed to be regarded as a duel between Governments, and the distinction between a State and its citizens is for international purposes to be recognized, then the enforced conscription by a Government of its subjects ought to be prohibited by rule of International

† Ibid., col. 891.

Law, in order that the duel-between-Governments principle may be fairly carried out. At all events, we ought clearly to see our way before admitting a one-sided application of so novel and dangerous a principle.

To conclude this part of the subject. If there be a class of citizens whose interests the State is bound before all others to consult, it is those who risk their lives in the quarrels of the State. If a cause of quarrel is so grave and serious as to induce a Government to lead hundreds and thousands of soldiers and sailors to slaughter in that cause; the Government owes it to them to neglect no independent available means for reducing the enemy to submission to the terms which it has felt itself compelled to demand at so terrible a sacrifice. A Government which fails in this duty says in effect that the lives of its soldiers and sailors are dirt cheap in comparison with bales of merchandise: since the cause for which the former are to be ruthlessly sacrificed is too trivial to disturb the sanctity of the latter.

I now come to consider the question as it bears upon this country. It must be obvious that a nation whose principal strength is in her navy has a greater interest in the maintenance of the right of capture by sea than a purely military power. A treaty between a naval and a military power which should forbid or restrain the use of the naval arm, without any corresponding restraint upon the military power, would be clearly one-sided. To use the language of Sir F. Goldsmid* :—

“If a tiger and an elephant were about to fight, it would be absurd for the backers of the tiger to propose that it should not use its claws and teeth, or for the backers of the elephant to recommend that it should not use its trunk.”

And the policy of this country was, until recently, in conformity with its obvious interest.

But, on the breaking out of the war with Russia in 1854, this country renounced the right of capturing Russian goods

* Speech delivered in the House of Commons on the 2nd of March, 1866.
Hansard, 3rd Series, Vol. 181, col. 1421.

in neutral vessels: and in 1856 we joined with other European powers in the famous declaration of Paris, by which neutral property was declared exempt from capture in enemy's ships, while enemy's property was declared exempt from capture in neutral ships; with the exception, in either case, of contraband of war.

I propose now to consider objections which are raised against the belligerent right to capture goods.* I will begin with the objection which is based on the alleged interest of this country.

1. It is urged that if this country has a greater naval power than any other, it has also a greater mercantile marine. Hence, it is argued, if we have more powerful engines of attack, we have also more exposed points. Whether, in case this country should unhappily become involved in war, the amount of British goods captured by the ships of war of the enemy would exceed in value the amount of enemy's goods captured by the ships of war of this country, is a matter of mere conjecture as to which it were idle to speculate. But this is not the point; the point is whether the losses inflicted by this country upon the enemy would or would not be felt more than the losses inflicted by the enemy upon this country. And the larger the actual commerce of the country, the less will any fixed and definite amount of loss be felt by the entire nation.

2. It is urged that the present state of things would be dangerous, in the event of war, to the continued integrity of our colonial empire. Our colonies would find their commerce endangered by the breaking out of a war in which they had had no voice, and upon a matter they did not understand; and hence would arise a demand for independence and separation. This argument deserves the greatest sympathy; for no patriotic Englishman can

* These objections are taken from the debate in the House of Commons, March 2nd, 1866, on Mr. Gregory's motion. See Hansard, 3rd Series, Vol. 181, cols. 1407—1430.

contemplate without dismay the prospect of colonial disruption. Still, if the principle of exempting enemy's goods from capture be so evil as we have attempted to show that it is, no consideration of consequences ought to induce us to adopt it. The true solution of the suggested difficulty as regards the colonies lies in another direction. But to suggest that solution would be beyond the scope and purpose of the present Letter.

3. It is urged that, as a matter of fact, the capture of of enemies' goods would not have the effect of shortening the war. It is said, for instance*, that, in the American Civil War, the ravages of Confederate vessels had not the slightest effect in intimidating the Northern States, or checking the progress of the war. With equal pertinency it might be alleged that the slaughter of United States' soldiers in the field had not the slightest effect upon the progress of the war. The fact is, the people of the Northern States felt that a great principle was at stake, and that their national unity and integrity were lost for ever, unless they would oppose a most determined resistance to the pretensions of the Confederates. The Confederates, on the other hand, were equally sanguine that theirs was a war of national independence against aggression. Can it be wondered that, under such circumstances, the war was fought out to the bitter end? The calamities suffered by each party, even assuming they served no other purpose, served at least this,—to test the faith of each party in the goodness of their cause. But, apart from this particular instance, we submit that there is a grave mistake in considering certain of the operations of war apart from the rest, and saying that such and such operations had no effect in checking the progress of the war. It would be equally pertinent to urge that the loss of such and such a regiment had no effect upon the war. The assumption which underlies the objection we are now considering is that the slaughter of men must under all circumstances have an

* Hansard, 3rd Series, Vol. 181, col. 1415.

effect upon the war, but that the taking of goods can have none. This is an assumption we cannot admit, without proof the most convincing and satisfactory. The fact is, the arguments against the capture of enemies' goods, and especially the one we are just now considering, are in fact arguments against war altogether. Except as arguments against war altogether, they have no validity. Now we are quite ready to admit that the arguments against war are overwhelming. Hardly anyone will dispute that. The difficulty is, in finding some practicable substitute for war for the settlement of international disputes. And, by diminishing the minor inconveniences of war, we not only do not approach the desired goal, but retreat farther from it.

4. Then it is said,* that "the mercantile community ought not to be made the especial victims whenever Government chooses to draw the sword." The first remark to be made upon this, though by no means a conclusive reply, is that the mercantile community have no small influence in deciding whether Government shall draw the sword or not; and if the mercantile community, in their own interests, would rather that the Government should not draw the sword, it is open to them to throw their influence into the scale of peace. And I cannot protest too strongly against the idea which seems to underlie the words I have quoted, that Government is at liberty to "draw the sword" whenever it pleases, at its own caprice and fancy, and is guilty of no crime against humanity in doing so; and that no one, except the traders whose goods are jeopardized thereby, has any particular right to object. And, indeed, the way in which the objection is put in the words I have quoted is, I venture to submit, one of the strongest arguments—perhaps the strongest argument—for the maintenance, to the uttermost, of the belligerent rights of capture. It is of the utmost importance to humanity that nations and governments should

* Hansard, 3rd Series, Vol. 181, col. 1486.

understand that war cannot, without wholesale murder, be undertaken "because Government *chooses* to draw the sword." A Government which, under an anxious sense of responsibility and an impending national peril, is impelled to draw the sword, may be acquitted in doing so. But "to draw the sword" with a light heart, is as foul a crime as man can possibly commit against his fellow-man.

I would now proceed to reply more directly to the objection I am considering, as to the mercantile community being the especial victims of war. First of all, they are not the especial victims of war. Soldiers and sailors, their wives and families, are the especial victims of war. Secondly, even admitting for the sake of argument that the mercantile community ought not, as between themselves and other civilians, to be the especial victims of war, it is, as I have submitted above, quite competent for the supreme legislature of the State whose merchants have so suffered to indemnify them for their losses out of the public treasury. It is monstrous to invoke a change in International Maritime Law to remedy an alleged evil which may be equally well remedied by Act of Parliament. Thirdly, what right have the mercantile community to complain because they happen to be subject to the risks legally incident to their calling? A person who enters upon the calling of a merchant or ship-owner may be presumed, when he does so, to have contemplated those risks, and chosen the calling in spite of them. Every special trade or profession is subject to risks from which other trades and professions are exempt, whether by the natural course of things or the operation of positive law. And the risk of loss of goods, unlike some other risks, may be guarded against by proper insurances. So that a merchant, so far from having more right to complain, has in fact less right than other persons who might be more seriously endangered. But, lastly, is it seriously contended that we should, at whatever cost, endeavour to make war tell with exact or at least approximate equality upon all classes? That the war should, as far as possible, be felt by

all members of the community engaged in it, is quite right; to attempt to make it felt *equally* by all classes, would be utterly ridiculous, except in those cases where it may be judged desirable to do this by pecuniary compensation.

5. Then it is said, that our shipowners would lose all their carrying trade on the breaking out of war, and would not easily recover it: and that that would be a grievous national calamity. This argument is based, of course, on the state of things which has arisen since the Declaration of Paris.* As, by that Declaration, enemies goods are exempt from capture in neutral vessels, it will of course follow that the merchants of the belligerent State will prefer the neutral vessels, where their goods will be safe, to the vessels of their own country, where their goods will be liable to capture. A deplorable picture is drawn of the transfer of the ships and seamen of this country to foreign countries.

"Our shipowners," it is said, "would transfer their vessels to foreign owners, and, worst of all, our sailors would follow the ships, for they would be attracted by the enormous wages which would be given them, and that strength upon which we relied in time of war would fail us."†

It is not very easy to follow this argument; and it is further complicated by the fact, that the Declaration of Paris is not of universal application. Suppose (1) this country to be engaged in war with one of the powers who were parties to the Declaration of Paris. Then, privateering being abolished, our mercantile marine cannot help us in any case. Whether the sailors of our mercantile navy serve in British or in foreign vessels will be quite immaterial for the purposes of the war. What the speaker probably meant to say was, that the mercantile marine forms a nursery for the Royal Navy: that on the breaking out of war, or even upon the apprehension of war, British shipowners would at once

* We do not, of course, intend to say that the Declaration of Paris has not left this country in a worse state than before. See *post*, pp. 17—24. All that we are concerned to maintain at present is, that we should fare still worse if we surrender all right to capture private property at sea.

† Mr. Gregory's Speech in the House of Commons, *Hansard*, 3rd Series, Vol. 161, col. 1412.

transfer their ships to foreign owners; that the seamen would go too, attracted by the prospect of increased wages, and that an economical Government would find far greater difficulty in attracting them to the Royal Navy from the foreign merchant service than from the British merchant service. The argument is certainly not flattering to the patriotism of British sailors or shipowners, or to the liberality of British Governments. And the reference to "enormous wages" seems to us to make the whole argument irrelevant, as it assigns an independent reason for the apprehended calamity. (2) If this country were engaged in war with the United States, or other State not party to the Declaration of Paris, the argument about shipowners losing their carrying trade falls to the ground. Neutral goods would be exempt from capture everywhere. British goods would be exposed to capture everywhere.

Independently of these considerations, is there no way by which merchant ships, deprived of their custom by the breaking out of war, might be utilized by the Government? Surely, under such circumstances, the shipowners would not be very exacting in their prices. But this is a point on which, of course, I cannot presume to offer an opinion. But what I would, at the risk of repeating myself, insist, upon most strongly, is this:—that however great the national calamity arising from the loss of the carrying trade of British shipowners (and a good deal which is said on this subject seems to me to be pure speculation), yet a Government which "draws the sword" must be prepared to face great national calamities. War is one of the greatest, perhaps the greatest, of national calamities; and the fact that it brings minor evils in its train is no additional objection to it.

6. It is said that peace is promoted by the social communications of commercial intercourse. This may very likely be the case when commercial intercourse is threatened by war. But we cannot argue therefrom that this will continue to be the case when commercial intercourse is allowed to go on in spite of war.

7. I now proceed to consider the argument to which the opponents of the right of capture apparently attach the greatest weight. It is said that private property on *land* is respected in time of war; why, then, should not private property *at sea* be equally respected? To this we reply, first, that assuming that private property on land is respected in time of war, that in no reason why a similar immunity should be extended to private property at sea. It is quite as competent for us to argue that private property on land ought not to be respected, because private property at sea is not respected, as for our opponents to argue that private property at sea ought to be respected, because private property on land is respected. We shall presently enter upon those considerations which have led to the partial sparing of private property on land. But we assert unhesitatingly, that where such considerations do not apply, the sparing of private property on land, so far from deserving the name of mercy or forbearance, is most unjustifiable and ill-timed leniency. But, secondly, is it the fact that private property on land is spared? On this point we cannot do better than quote the following from Manning's *Commentary on the Law of Nations*, published in 1839. *

"It is undeniable, as a general rule, that an enemy has a right to capture the property of his adversary. . . . This right, as we have seen, † has been modified by custom in regard to wars by land.

"As far as right goes, a belligerent, according to the jurists, and according to the ancient practice of Europe, has a complete right over *all* the private property of the subjects of his enemy, and even in wars by land. But this right has been gradually modified, and private property on land is usually respected by belligerents, as long as requisitions for their troops are complied with. This lenity has, however, been merely introduced by usage. It probably had its origin in its being the interest of conquerors to attempt to reconcile a vanquished nation to a change of sovereignty, according to the maxim, as old as Machiavel, that 'men sooner forget the death of their father than the loss of their patrimony.' Even

* Pages 205, 206.

† Pages 124, 132.

at the present day, when a respect for private property on land generally obtains, the right is still exercised whenever a belligerent finds that his convenience demands such violent measures, as in the case of towns given to be sacked; and of forced contributions levied in an enemy's territory. The rights, then, of a belligerent extend to the private property of the subjects of his enemy; but custom has introduced a lenient application of these rights in wars by land. Now this lenity has *never* been practised in naval warfare. The right over an enemy's property, acknowledged in all cases has, in naval warfare, been uniformly exercised without any single exception. . . . The right to seize the private property of enemy's subjects of sea, *in which is concerned so much of the essence of naval warfare, and the benefit of maritime superiority*, is acknowledged by all authorities and has been constantly practised by all Governments." [The italics in the last sentence are our own.]

To the clearness and cogency of this passage it is difficult to add anything. I propose, however, to consider briefly in detail the grounds on which private property on land has been spared. These grounds are for the most part these; 1. Considerations of military discipline. It is clear that the capture of private property on land, if practised to an unlimited extent, will seriously impair the discipline of the army which practises it. 2. The policy, as far as possible, of not unduly inflaming the hatred of the inhabitants; for if the inhabitants become unduly exasperated against the invading army, not only might military operations be seriously impeded, but the war might easily degenerate into wholesale and indiscriminate massacre; and the feelings excited by the war would become a fruitful source of fresh wars. 3. And, generally, the danger of producing permanent and irreparable mischief to interests which all nations are presumed to have at heart. On this principle works of art (for instance) are often spared by an invader. 4. As the taking of private property is much restrained by the above considerations, and the question, in any particular case, of the application of the principles implied therein might be one of great difficulty; it has become the practice of belligerents to reverse the presumption as to the capture of property on land, and *not* to take it without some special military reason

for doing so. But where such reason has existed, the right has been exercised without scruple. And of the validity and sufficiency of the reason, the belligerent captor is the sole judge.

I have thus attempted to show that the maintenance of the belligerent right of capture, so far as it exists, is of importance to humanity in general, and to this country in particular; and I have also examined the objections which have been urged against the exercise of the right. I now proceed to consider the mode in which this right may be asserted and maintained, and, as far as possible, re-established.

The first point which arises on this part of the question is whether it would be possible, consistently with the public faith of this country, to repudiate the Declaration of Paris? It was the opinion of Mr. John Stuart Mill that this might be done, provided we do not wait until the emergency arises when we shall be called upon to shape our conduct in conformity with it.

"Let us,"* he said, "either disown this obligation or fulfil it. Let us disclaim it like honest men in the face of the world, openly and on principle, and not hypocritically profess one doctrine up to the very moment when our immediate interest would be promoted by exchanging it for another. . . . It is not when the emergency has come, but before it comes, that we have to form our resolution on this most momentous subject: not only to form our resolution, but to declare it."

We might contend that the Declaration is not a treaty, but a mere declaration of intention; that it has no parliamentary authority; that it was not ratified by the Crown; that it was accompanied by other agreements of equal validity,† which, if carried out, would seriously cripple the independence of this country in its treaty-making power, and which have, in fact, not been observed by the country; that the Treaty of Paris of 1856, and the "declarations"

* Speech in the House of Commons, August 5th, 1867. Hansard, 3rd Series, Vol. 189, col. 884.

† See the *Diplomatic Review* for July, 1871, Vol. xix., No. 3, p. 82. The number is well worthy of perusal by any one who desires to be informed on the subject.

which accompany it, have not been altogether held sacred by the Powers which acceded to it. Very much might be said on these points; but I am unwilling to enter into them in detail, as I believe that, having regard to the opinions expressed by your Lordship and other statesmen on this subject, it would be quite hopeless to attempt to procure a repudiation of that Declaration; that such repudiation, if it were made, would be regarded (rightly or wrongly) as a grave breach of faith by other Powers; and that a reversal of the principles of that declaration, so far as desirable, may be obtained by other means which I now proceed to mention.

But though the Declaration of Paris be not repudiated by us, that is no reason why we should not attempt to procure its reversal. And, as I have suggested at the commencement of this Letter, the Congress to be held at Brussels gives this country an opportunity of insisting upon this point. Let ministers resolve to have nothing to do with the Congress, except on the understanding that the Declaration of Paris be reversed. I submit that we ought not to allow this opportunity, or any other opportunity of the kind, to go by without at least attempting to procure a reconsideration of the question.*

But, it may be asked, is it desirable to procure the reversal of the Declaration of Paris if we had the power?

Those who deny this, offer arguments in support of their contention which practically amount to one or other of the following:—

1. That this country, if belligerent, would gain more by the exemption from capture of its goods on board neutral vessels than by the right to capture enemies' goods on board neutral vessels.

2. That the exercise of the right* would be attended by danger to this country, in provoking neutral nations against us; so that, in our own interest, it is better to forego it.

The first of these raises the general question as to the

* Written before the matter was brought before the House of Lords by Lord Denbigh on the night of Friday, July 3.

exemption of private property at sea in time of war ; and what we have said on the general question applies, *pro tanto*, to the case of British goods in neutral vessels. And to this we may add, that the shipowner's argument as to the loss which war must inflict upon the carrying trade of the country since the Declaration of Paris, and the merchant's complaint of the law as it existed prior to the Declaration of Paris, are, if not directly, at all events to a certain extent, antagonistic to each other. If the Declaration of Paris has relieved the merchant, it has, to quite as great an extent, injured the shipowner. Of course, as we have above attempted to show, the interests of both merchants and shipowners are properly to be subordinated to the interests of the nation at large.

As to the second of the arguments we have been considering, so far as it is independent of the first, it simply amounts to this :—That it is competent for Ministers of State for the time being to tie the hands of subsequent ministers, lest they should make an indiscreet or mischievous use of their power. And I presume that your Lordship would attach some weight to an argument of this kind : for in the debate of August 5th, 1867, on Mr. Mill's motion, your Lordship is reported* as saying (in answer to Mr. Mill's argument, that, if England had not deprived herself of the use of this weapon, we must have intervened with more effect in various disturbances in which foreign powers have been or may be engaged) that—

“The power to intervene effectually is a temptation to do so ; and if the Declaration of 1856 has prevented us from mixing ourselves up with Continental complications with which we had nothing to do, all I can say is, that that is one of the best arguments I have yet heard in its defence.”

Your Lordship's argument is on a different matter from that which I am at present considering. Your Lordship is speaking of that power to carry on war which, before the Declaration of Paris, was available to this country, as a temptation to enter into war lightly. The argument to which I am now addressing myself has reference to the

* *Hansard, 3rd Series, Vol. 189, col. 886.*

undue exercise of that power when war has actually begun, as likely to provoke neutral States. But as I conceive that both arguments are open to the same objection, I shall treat them together.

And I would seriously ask whether it is in fact a justifiable thing in any case for a minister of this country to destroy any power which the country possesses, lest she should at any future time abuse it? to cut the claws of the British lion for fear he should do mischief with them? or, to use the expression of the late Earl of Derby*, to cut off the right hand of the country? But it would seem that the bellicose propensities of Great Britain, and the practise and lamb-like tendencies of other nations, have been so amply demonstrated by the history of the last twenty years, that ministers have nothing better to do (in the interests of progress and civilization) than to cripple the powers and resources of the country by suicidal treaties, and by a judicious "economy" in the naval and military services. And, for the same reason, the idea of any foreign nation making a wrong use of its power is, of course, not to be entertained for a moment.

But I would most respectfully submit to your Lordship that it is not competent for a Minister of State to destroy the legitimate weapons of offence and defence which the country possesses on the ground that they may, at some future time, be misused. One of the arguments against irrevocable legislation applies also here. Why should Her Majesty's ministers be more at liberty to control and hamper the actions of future ministers, than the Parliament, by acts of legislation, to control future Parliaments? Of course, if the country receives a *quid pro quo*, the value of what is received may be set over against that which is surrendered. And if the power surrendered be one which cannot but be exercised mischievously, the case is different. But it is absurd to contend that the right of capture of enemy's goods on board neutral vessels is one which can never be exercised with

* Speech in the House of Lords, May 22, 1856. Hansard, 3rd Series, Vol. 142, Col. 535.

benefit to this country. I submit that the belligerent rights of capture, in the same manner as the other rights and prerogatives of the country, are to be held sacred by those entrusted with the administration of its public affairs, to be duly exercised on future occasions, whenever the emergency shall arise. It is not for the ministers of the present so to judge of the exigencies of the future, as to shackle their successors in the free exercise of their judgments upon those exigencies.

I would conclude by quoting the opinions on this matter of Mr. Pitt, and of the late Earl of Derby.

Mr. Pitt, speaking in the House of Commons, on March 25, 1801, of the doctrines attempted to be imposed upon Europe by the Baltic confederacy, of which the principal doctrine was that the neutral flag covers enemies' goods, said,*

"Are we to sacrifice the maritime greatness of England at the shrine of Russia? Four nations have leagued to produce a new code of maritime laws, in defiance of the established law of nations and in defiance of the most solemn engagements, which they endeavour arbitrarily to force upon Europe. . . . It is a violation of public faith, it is a violation of the rights of England, and imperiously calls upon Englishmen to resist it, even to the last shilling and the last drop of blood, rather than tamely submit to degrading concession, or meanly yield the rights of the country to shameful usurpation."

The late Lord Derby, in a speech in the House of Lords on May 22, 1856, said † of the Declaration of Paris :—

"All I know is, that it took the people of England entirely by surprise, and the Plenipotentiaries equally so. It was not hinted at during the course of the Conferences up to the 8th of April, and then, for the first time, Count Walewski brought forward this new declaration of international law. The surprise of the Plenipotentiaries of the other Powers was no less than that of the people of England. Prussia, consistently and wisely as a carrying Power, jumped at a proposal she had been urging for the last 100 years. Russia and Austria were more cautious; their Plenipotentiaries

* *Hausard, 1st Series, Vol. col. 1128*

† *Hausard, 3rd Series, Vol. 142, col. 529.*

stated that the matter was beyond their instructions, and desired time to consult their Courts. They did so by telegraph, and received for answer,—‘Good Heavens! is England so weak as to consent to this! We have been trying for the last eighty years to find a British minister who would surrender this point, and here we have one at last!’”

And, further, in the same speech, the late Lord Derby says* :—

“According to my reading of the Articles, you gratuitously and tamely, without application from any Power, but upon the recommendation and following in the wake of France, surrender a right which belonged to us, which was established as a right by all jurists of earlier days, which was recognized by all jurists of modern times, which has been upheld by every statesman of importance in this country down to the latest, and which it was reserved for the present Government to throw away, although Pitt and Grenville and Canning successively declared it to be the mainstay of the naval power of England.”

I would, therefore, humbly submit to your Lordship that, if the opinions of our most eminent statesmen are not to be disregarded in this matter, the part taken by this country in the Declaration of Paris in 1856 must be looked upon as a false step, involving most serious consequences, and to be retrieved at the earliest possible opportunity; although, as I infer by implication from your Lordship's answer to Lord Denbigh in the House of Lords last night, the present is not, in your Lordship's opinion, such an opportunity.†

I am, my Lord,

Your Lordship's obedient Servant,

HERBERT N. MOZLEY.

* *Ibid.*, cols. 588—9.

† A portion of this letter was in the press before Lord Denbigh put his question in the House of Lords.

VII.—HISTORICAL SKETCH OF THE OFFICE OF SERJEANT-AT-LAW.

WITH the coming into operation of the Supreme Court of Judicature Act on the 2nd of November, 1875, virtually the time-honoured institution of the Serjeant-at-law will come to an end. For centuries past the office has been one of no small importance, inasmuch as the honour it conferred on the limited few it was the custom to appoint, and who aspired to it, was one of some distinction, and carried with it privileges which were not within the reach of ordinary advocates, as the mode of creation by king's writ, and the solemnities and ceremonies of their call would testify.

The antiquity of the office of Serjeant-at-law is as ancient as the law itself, and the degree is older than most others. It is said the order flourished before the Conquest. In early times serjeanties were of different kinds. It was the custom to hold lands in serjeanty in various parts, and it appeared to be the special office of those who were created such to defend the rights of the Sovereign. Inferior offices, such as coroner, keeper of the peace, &c., were held by serjeanty. Another class of serjeanties were to attend to the personal requirements of the Sovereign or to perform some particular service relating to war not requiring personal military service. Later on this last species of serjeanty was termed "petty serjeanty," to distinguish it from the others. Serjeanties were also created by some of the great vassals of the Crown, but in later times the term was confined to tenures of the King, designated as "tenures by Knight's service," whilst others were treated as socage tenures. The tenant in serjeanty was bound to perform the duties of the office, either himself or by deputy, but from the nature of the services the latter course was generally adopted, particularly in the inferior offices connected with the law, and in some of these the designation itself was given to the person

who actually performed the services, such as the Serjeant-at-mace of the Houses of Parliament. But about this period, in respect of these the term "serjeant" grew out of use, and the title of "esquire" succeeded.

About the time of the Conquest the order is supposed to have been introduced. Men who had studied the laws in Normandy came to this country with the King, and thus obtained a writ, by the advice of his council, to the degree. They administered the law generally in counties, and it is said the King had serjeants in every county to prosecute pleas of the Crown, but there is no doubt that about this time many cities possessed the privilege of appointing their own administrators of justice. This, of course, gave rise to the heavier and more important causes alone being sent up for trial in the King's court, causes which contributed considerably to the revenues of the Crown.

In the reign of Edward I. the Courts of King's Bench and Exchequer were ambulatory Courts, and followed the King wherever he by chance might go. The Court of Common Pleas, on the other hand, was stationary. Dissatisfaction soon arose among suitors owing to the difficulty of procuring counsel to conduct their cases, and this gave rise to the passing of a statute authorizing 140 persons to act indiscriminately as attorneys and advocates, an arrangement which does not appear to have been very satisfactory, and complaints in parliament were made of the inconvenience of these ambulatory courts to no avail.

Westminster was declared by Magna Charta to be the seat of justice, though Coke observes that this was only declaratory. Early in the reign of Henry II. it was found expedient to appoint Justices to go circuits for the trial of causes, and it would appear that Serjeants-at-law were called on to act when their services were required, as also were the Sheriffs, though it is difficult to say at this period whether one and all, more or less belonged to some religious order who, as an historian observes, "being bound by their order to shave their heads, were, for decency and comeli-

ness, allowed to cover their bald pates with a coif, which has ever since been retained." Whitelock says, it is a mistake to suppose that the Court of Common Pleas was established by Magna Charta, and Coke and others agree that the origin of the Court is unknown. Serjeants are mentioned in the Year Books as early as Edward I. and by Bracton, and in the Mirror of Justice, said to be written before the Conquest.

In the superior courts of Normandy litigants themselves were allowed to plead by their "conteurs," but on the introduction of the Norman system into the superior court of England parties were not allowed to conduct their own causes, but were compelled to engage persons conversant with the law to conduct their suits. These officers were termed "countors" and the amount of fees received by them seems to have induced the conversion of the office into a serjeanty, which was effected by Royal Mandate in respect of serjeants practising in Aula Regia, otherwise the Court of Common Pleas, and by letters patent in respect of those practising in Dublin. They were called narratores, countors or conteurs, because the count or declaration comprehended the substance of the original writ and the foundation of the suit. Respecting the position of serjeant at this period, Lord Campbell observed, "If immemorial usage be relied upon, we must remember that serjeants, counters, and other counsel existed in England long before the time of Edward 1st; and there seems every reason to believe that they communicated directly with the parties."

We here introduce the well-known prologue in the "Canterbury Tales," by Chaucer. The Serjeant is addressed as the "Sire Man of Lawe," and is thus described:—

"A serjeant of the lawe, ware and wise,
That often hadde yhen at the parvis,
Ther was also, full riche of excellence,
Discret he was and of gret reverence,
He semed swiche, his wordes were so wise,
Justice he was ful often in assise
By patent and by plaine commissioun,
For his science and for his high renoun

Of fees, and robes had he many on,
 So gret a pourchasour was no wher non
 All was fee simple to him in effect,
 His pouchasing might not bin in suspect.
 No wher so bery a man there n'as,
 And yet he semed besier than he was.
 In termes hadde he cas and domes alle,
 That fro the time of King Will were a falle.
 Thereto he coude endite and make a thing,
 There coude no wight pinche at his writing;
 And every statute coude he plain by rote,
 He rode but homely, in a medlee cote,
 Girt with a seint of silk with barres smale;
 Of his array tell I no longer tale."

Lord Campbell continued, "The purvise is well known to have been a sort of exchange at St. Paul's, where all ranks met to do business, and the Serjeants-at-law, like Roman patrons, gave advice to all who came to consult them. Afterwards each Serjeant-at-law had a pillar in the cathedral assigned to him, where he stood and communicated with his clients. The advantage to be derived from sub-dividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process and did what was necessary in the offices of Court for bringing the cause to trial, and for having execution on the judgment."

These observations, in which there appear to be a general belief, are probably grounded on Dugdale:—"There is a tradition that in times past there was one *Inne* of Court at Dowgate, called Johnson's *Inne*, another in Fewter (Fetter) Lane, and another in Paternoster Row, which last they would prove, because it was near to St. Paul's Church, where each lawyer and serjeant at his pillar heard his client's cause and took notes thereof upon his knee as they do in Guildhall at this day."

But Whitelock says this was grounded on mistake of one of their ceremonies of state when they went to St. Paul's to offer. A manuscript of the call of Fitzjames and other Serjeants in the reign of Henry VIII., states that their steward brought every one of them to a several *pillar* in

Paul's, and there left them a time for their private devotions. This would appear no convenient time for clients. He then quotes the following from Herbert's "Antiquities of the Inns of Court:"—"And when the newe serjaunts have dyned, then they goo in a sober manner with their seid officers and servaunts into London, oone the est side of Chepe Syde, oneto Seynt Thomas of Acres, and ther they offer, and then come doune on the west syde of Chepe Syde to Powles, and ther offer at the rode of north dore, and at St. Erkenwald's shrine, and then goo downe into the body of the Church, and they be appointed to their *pyllys* by the styward and countroller of the feste, which brought them thidder, with the other officers."

This to a certain extent may be consistent with Dugdale who, after speaking of an alleged Inn of Court in Paternoster Row next to St. Paul's, says "and within one howre after (i.e., two o'clock when the Lord Chancellor and other Lords who had partaken of the feast given in the call of Whiddon, Coke, Pollard, and others, in 1547, at Lincoln's Inn departed) the seid newe sergeaunts went to Paule's, and there eche of theme stode at their severall *pillers* in the body of the church accordyng to the auntyent custome ine that case used, and from thens they camm to Sergeaunts Inne every of them to their severall chambers, and there remayned."

Lord Campbell, in his "Lives of the Lord Chancellors," speaking of this custom, observed that there was nothing discreditable in it; and that some provincial counsel are still said to "keep the market" in the towns where they reside. The practice of taking instructions directly from the client was followed by the most eminent members of the English Bar up to a recent period. Not only young students but even such as Sir Edward Coke and Sir James Asgham then were, took instructions from their clients in person.

Be this as it may, the practice of taking instructions from any one but a solicitor or attorney has been opposed to the etiquette of the profession for many years, and few are able to bear witness we ween; to any member of the bar hold-

ing "purvise" in any provincial town. It is said that both at Westminster Abbey and St. Paul's there was a parvis at which the Serjeants took their walks and saw their clients. It was the custom of the Roman bar to walk the Forum to give advice. The old cathedral of St. Paul was burnt down in the great fire of London. The centre aisle, called Paul's Walk, seems to have been a place of public resort for all classes, at certain hours in the morning and evening.

Serjeants appear originally to have been *Servientes regis ad Legem*, but since the reign of Edward I. the term *regis* has been omitted in recognition of their services to the Commonwealth, except in those cases where the services of Serjeant have been specially required by the King. They were recognized by name and office in the statute of Westminster. The Judges of the courts of law by custom, and in order to enable them to hold assizes, must be of the rank of Serjeants, but Barons of the Exchequer need not be of the degree of the coif except for the last reason. The coif distinguished the latter from the cursitor barons.

There is no doubt, therefore, that the office of Serjeant has existed from time immemorial. The Serjeant called by the King's writ from the graver persons among the apprentices was of long experience, and though he was not bound to attend his court, except at his pleasure, he, nevertheless, swore "not to delay the people." Neither could he be estranged from the court so that he could not plead. The Serjeant's duty originally was to frame the pleadings in each cause for which he was responsible for deceit or interruption of the due course of justice. Hence the ancient rule of the Serjeant's hand having to be put to all pleas. His coif could not be taken away from him by the court because it was given him by royal writ. By their oath they were bound to serve if called upon. "The oath," says Lord Coke, "consisteth on six parts:—(1). That he shall well and truly serve the king and his people as one of the King's Serjeants-at-law; (2) that he shall truly counsel the King in his matters when he shall be called; (3) and duly and truly

minister the King's matters after the course of the law to his conning ; (4) he shall take no wages or fee of any man for any matters where the King is party against the King ; (5) He shall as duly, as hastily, speed such matters as any man shall have to do against the King in the law, as he may lawfully do without delay, or tarrying the party of his lawful process in that belongeth to him ; (6) he shall be attendant on the King's matters when he shall be called thereto."

Such a state and degree were not among the lawyers of any other country. In early times the King and the people were much interested in the degree. Their robes of office and officers, their bounty in giving rings, their feasts like a coronation, lasting seven days, at which Kings and Queens were present, and the honour and esteem in which they were held, must at that period have been an enviable position to some.

The saying, "once a serjeant always a serjeant," is not quite applicable. True no promotion or accession of honour can take away the dignity, except that the appointment of a King's Serjeant as judge extinguishes that title. The same means must be applied to discharge a Serjeant as was used to appoint him, namely by royal mandate. Thus, in the reign of Philip and Mary, a Serjeant was discharged from attendance and wearing the coif and robes as if he had never taken office. No other office, not even the creation of a peer of the realm, would discharge him from the degree of the coif. Many instances occurred of the appointment to the office being refused probably owing to the great expense it entailed in giving feasts and presents. In the reign of Richard II. six "grave and famous apprentices" had writs delivered to them to take the degree of serjeants, which they refused to do, whereupon a complaint was made against them in Parliament, and they were obliged to accept the appointment or pay the penalty.

The dignity of the appointment had to be kept up at a very great expense, or what may be considered in those days

as a considerable outlay for grand feasts. Connected with this, Serjeants-at-law were allowed by the sumptuary laws of the period, at the time they took their estate upon them to enjoy greater privileges by way of giving liveries to their dependents than knights and others, and among a chosen few they were allowed more broad cloth in their riding gowns or coats than anybody else. There is no doubt that the form and ceremonies of making new Serjeants varied very little for centuries. The description of a call in the reign of Henry VIII. differs very little from the one described in that of George III. It would appear, indeed, that the most ancient calls were the most magnificent and sumptuous, inasmuch as we read that in Henry VII.'s time the King and all his household attended at Lambeth Palace on the call of three serjeants. Their feasts and entertainments were most lavish and sumptuous, and were frequently attended by royalty and the principal nobility, the Lord Mayor and aldermen, the judges and principal officers of State. In the seventeenth century, the custom was to take the usual oaths at the Chancery bar, to proceed (conducted by their respective societies) to Gray's Inn, and perform the ceremony of counting before the judges, to walk in their party coloured robes (accompanied by officers and others of the societies) to Westminster Hall, where at the bar of the Court of Common Pleas they counted again and gave rings to all the judges and serjeants, and afterwards entertained them and the nobility at dinner. It frequently occurred that at the Chancery bar or at the Common Pleas at the time of the inauguration, addresses were delivered by the Lord Chancellor or one of the Lord Chief Justices. The addresses on these occasions by Lord Bacon, Lord Keeper North and others, are well known for the large amount of learning they contained. Sir Philip Yorke, afterwards Lord Hardwicke, was the first who counted in English. He was a strong opponent of throwing open the practice of the Court of Common Pleas to the profession generally.

In Lord Hardwicke's time (1775) the last general and

regular call took place. On this occasion there were fourteen gentlemen made serjeants, and the instalment was conducted with great pomp and ceremony. On taking the oaths of allegiance and supremacy they attended the courts at Westminster and counted before all the judges and presented rings, after which in their bar gowns and full bottomed wigs they met the Judges and the ancient Serjeants in their scarlet and purple robes in the Parliament Chamber of the Middle Temple Hall, and the Benchers and others in their gowns, when they partook of biscuits and mulled wine. They then proceeded to the Hall, and were addressed by the Lord Chancellor, Lord Hardwicke, in appropriate terms, and had their coifs and hoods placed on them by the Judges, after which they donned their party coloured robes and tabard and walked to Westminster Hall, accompanied by their colts, clerks, and other attendants, when they again "counted" and more rings were presented to judges, members of the royal family, and the principal officers of State. The whole proceedings ended with a sumptuous dinner in the Middle Temple Hall, where the nobility, judges and others according to their respective ranks took their seats. On a table by itself was a baron of cold beef with the royal arms planted upon it, which should have been carried in the procession, but was forgotten. The general expenses of the call came to about £185 each, but this is no criterion of the actual cost, inasmuch as presents far exceeding this sum, in the aggregate, were made to friends at Westminster and on circuit.

In 7 & 8 Hen. IV. (1406), a Bill was presented to the Commons for certain restrictions upon dress and practically upon hoods (chaperons), "Provided always that the justices of one bench and the other and *the King's Serjeants* may use their hoods as seeming to them best for the honour of the King, and of their estate;" but it is provided that no esquire, apprentice at law, clerk within the King's hall, or abiding with other lords of the realm, not being advanced, shall use furs of grey, &c.

It is uncertain at what date rings were first presented,

but the origin of mottos dates only from the reign of Elizabeth. Chief Justice Wray, in the nineteenth year of the reign of that Queen, stated that the motto "*Lex Regis Præfidium*" on the rings of Serjeants Bendloes, Powtrel, and Mead, who were said to be the only three serjeants then living, were the first that he had met with. In the second year of George III., on the call of Baron Gould and another, the celebration by means of a feast was dispensed with, and a payment of £100 in lieu of the usual feast and fine of £10 accepted, but wine and biscuits had to be sent as usual. The call of sixteen serjeants in the reign of Charles II. seems to be the largest on record. It is said that William Bendloes was once the only serjeant for part of the time of Philip and Mary and part of Elizabeth's reign. It is possible, or more than probable, that this was owing to the writs abating after the death of Mary, as in 1 Elizabeth four serjeants were arguing in the Common Pleas.

On the other hand, the serjeants possessed privileges to which the apprentices and others were not entitled. The distinction between a serjeant and an ordinary advocate was that serjeants were sworn not to attend to the behests of the crown alone, but to serve the king's people against the king, while apprentices were called for no particular object, and were not sworn. They had exclusive right of practice in one particular court, and their services were always brought into requisition in the leading and better class of business in the profession. Though not by the oath were they bound to serve the king, but in several instances Parliament compelled them to defend the Throne, and also called upon them to attend at the trial of petitions in the House. They were exempt from knighthood, which by the common law of the period, was imposed upon persons having a pecuniary standard, and was considered by many more a burden than an honour. In the reign of Henry VI. a serjeant having refused to appear to receive the order of knighthood, pleaded his privilege, which was accepted. No serjeants were knights till the latter part of the reign of Henry VIII. Serjeants had also an

exclusive right of practising in the Marshalsea Court—a Court for the trial of causes for the recovery of small debts, abolished by the County Court Act, but this right was taken away by statute in the reign of Henry VIII. They were exempt from being empannelled at the grand assize. They signed all pleas, and were frequently consulted by the judges on points of law, and were eligible to sit as judge at assize. The appointment was always considered one of rank and distinction.

Out of the ordinary Serjeants-at-Law the King appears to have appointed his own, called “King’s Serjeants,” and in the reign of Edward I. these serjeants had pensions assigned them, for their services out of the Exchequer, and afterwards it is recorded that they received £20 a-year for attending to the business of the King. It is stated in the “Mirror of Justice” that with regard to the judges who served the king that it was lawful for them to accept twelve pence from the plaintiff for hearing the cause, and the pleader sixpence. The judges were afterwards forbidden to accept fees, but not the serjeants; and instances have occurred where serjeants have sued for their fees.

In 5 Richard II. (1381) the Commons prayed that two justices, two serjeants, and four apprentices at law, be appointed to enquire into the grievances from delays in law, &c., and at the same Parliament it was ordered that “as well the clerks of Chancery of the new principal degrees, justices and serjeants, and all the barons and great officers of the Exchequer, the Master of the Rolls and Master in Chancery, and also certain persons of the best apprentices of the law shall be charged by their allegiance and by oath each degree by itself to advise themselves diligently of the abuses, wrongs, and defaults, &c., done or used in their respective “places,” and in the King’s courts, and also in the courts of other lords throughout the realm, &c. One important duty the Serjeants had to perform was to assist the triers of petitions in Parliament, as officers in the Parliament rolls of Edward III., and during that reign and

others following, a selected few of the Serjeants were summoned to give attendance on Parliament, on the Duke of York preferring his claim to the Crown, held by Henry VI., and were ordered to defend the King's title.

Serjeants-at-law were known and recognized as a body having precedence in ancient times. Their leading at the bar was established by custom and ancient usage. In former times the King's premier serjeants, and the King's ancient serjeant took precedence of the King's advocate, attorney, and solicitor general; but in 1814, the Attorney and Solicitor General, by Royal Warrant acquired precedency and priority of rank over the premier and ancient serjeants. This occurred more from accident than otherwise; Serjeant Shephard, who was the King's ancient serjeant, being appointed solicitor general, would have led the attorney general. It was, therefore, necessary to make some alteration. By special order of the Prince Regent, the Queen's premier serjeant and the Queen's ancient serjeant rank next the solicitor-general, and the Queen's advocate next after the Queen's serjeant. This was presumed to be so till the year 1855 when an appeal from the Admiralty court was likely to be heard. The question arose whether the attorney and solicitor could lead the Queen's advocate. The Attorney and Solicitor General thought they were entitled to take precedence of the Queen's advocate. Before the date of the warrant the Queen's advocate had undoubtedly the right of precedence, standing between the ancient serjeants and the law officers of the Crown. By taking rank next after the solicitor general the status of Queen's advocate was not touched, and as the serjeants had no connection with either the Ecclesiastical or the Admiralty Courts, and that the warrant was to be observed in the Chancery Courts, and other courts at Westminster, no mention being made of any other court, Lord Cranworth, to whom the question was referred, was of opinion that the warrant did not affect the Queen's advocate, and that there was not sufficient ground for recommending any change, but if it became necessary to establish

the precedence of the Attorney-General over the Queen's Advocate, he would consider whether it would not be advisable to do so by warrant in the same manner as in 1814. A Serjeant once offered to move before the Attorney-General Sir Francis Bacon, who indignantly appealed to the Court, on which Chief Justice Coke remarked that "No serjeant ought to move before the King's attorney, when he moves for the King, but for other motions any Serjeant-at-law is to move before him, and when I was King's attorney I never offered to move before a serjeant unless it was for the King." The order of precedence among advocates is now as follows: —1, Queen's Advocate-General; 2, The Attorney-General; 3, The Solicitor-General; 4, Queen's Counsel; 5, The Serjeant-at-Law; 6, Barristers-at-Law. The patent of precedence places a Serjeant on the same footing as a Queen's Counsel, ranking next after the one last appointed. The Common Serjeant of the City of London not being admitted to his office by virtue of the King's writ has no right of audience; but he takes precedence of those who are neither Serjeants or Queen's Counsel, and he sits within the Bar at *Nisi Prius* with a silk gown. Serjeants who have been knighted do not precede others who are not.

In 23 Car. 11., Sir Edward Turner, Speaker and Solicitor-General, is said to have been the first King's counsel. Sir F. North is also said to have been the first King's counsel. He was called upon to argue on behalf of the Crown in a case before the House of Lords, in the place of the Attorney-General, who being an assistant of the House was not privileged to argue, on the termination of which he was made a "King's Counsel" which gave him preaudience within the bar. Lord Bacon was made a King's counsel extraordinary, but without patent or fee, or a kind of *individuum vagum*.

The coif is the badge of the Serjeants. It is composed of lawn, and worn on their heads under their caps when created. They possess the privilege of wearing it in the presence of royalty. Robes, in various forms and colours have been used from time immemorable to distinguish the

advocates and administrators of justice. Party coloured robes were much in vogue in Chaucer's time, which gave rise to his "Parson's tale." They were used to ensure due respect being paid to persons and office. Lord Clarendon observed that if they were laid on one side the people would soon lay aside their respect. The judges, serjeants, and attorneys all had their party coloured robes both for winter and summer, and their robes were considered essential to the law itself.

On taking the degree of the coif a barrister gives up the Inn of Court to which he was called, and joins the Serjeants Inn. So a judge, on being made a serjeant, on his appointment is now no longer a bencher of the Inn he belonged to. There were originally three Serjeants Inns, Scroops Inn, opposite St. Andrew's Church, Holborn; Serjeants Inn, Fleet Street; and Serjeants Inn, Chancery Lane, commonly called Faryndon Inn. The latter is now the only Inn of the order, and it is here where the judges and the serjeants in brotherhood dine together on the first and last days of the term. In 1837-8 the Inn was re-built, with the exception of the old hall, which is now elaborately fitted up as a State dining room. This, and the private dining room contain one of the finest collections of portraits of judges anywhere to be found. The Inn is the exclusive property of the Serjeants-at-law, and now their dignity and privileges are taken away from them it may become a question among them how to dispose of it.

In 1765 was published a pamphlet by E. Wynne, entitled "Observations touching the Antiquity of the Degree of Sergeant-at-Law." The body of the work was by some other hand, as is stated in the advertisement to it as follows:—"If the project that occasioned these observations had not stopped almost as soon as it was conceived, these papers, I am persuaded, would have been published by the author." Wynne merely annotated it. The paper had reference to a scheme to be brought before the House of Commons "to lay open the Court of Common Pleas, and to

empower all barristers to practise in that Court as serjeants do now." This proposition was laid before the judges by Lord Chief Justice Willes in the form of a Bill, "That it be enacted that all barristers may practise in the Court of Common Pleas as the serjeants do now, and (as the consequence of that probably will be, that there will be no more serjeants), that it be likewise enacted, that for the future any barrister of such a standing as shall be thought proper, may be a judge of any of the Courts of Westminster, and be put into any of the Commissions on the respective circuits, though not a Serjeant-at-Law, and without being called to the degree of Serjeant-at-Law." The Lord Chief Justice adds "that he should be glad if any proviso could be thought of to give some particular privileges to the present serjeants, as that all special pleadings should be still signed by them; and that they should have pre-audience or any other privileges that should be thought proper." Nothing came of this proposition, and things continued as they were wont. But Wynne went on to ask what the serjeants had done to incur this displeasure, why they were to be deprived of their privileges, or what could induce any one to attempt such an innovation, and then inquires into the antiquity of the order.

He argued that no possible good could arise from throwing open the Court of Common Pleas to the bar generally, that the uncertainty of attendance would be a great inconvenience to suitors, that it would be putting aside an ancient and honourable order to the great loss and disadvantage of the serjeants who had paid dearly for the privilege and who were at all times on circuit at the service of the Crown in sitting in commission as judges of assize, that men of distinction would only accept the degree as a turnpike to the bench, that it would leave a stain and blemish on the serjeants and draw down public displeasure on a class of men who were always ready and willing to serve the public, as if they were the lowest and most unworthy part of the profession.

No change however took place, and things went on as they

were till the 25th April, 1834, when in order to facilitate the general dispatch of business in the courts at Westminster, a royal mandate of His Majesty the late King William IV directed that the right of practising, pleading and audience in the Court of Common Pleas, during term should cease to be exercised exclusively by serjeants-at-law, which order was obeyed by the judges. The court in its sittings after term was open to the whole profession and it might have been difficult to distinguish the difference between this class of business from that conducted during term. The mandate provided also that serjeants-at-law should take precedence next after King's Counsel. This mandate was carried into effect and remained in force for upwards of three years, when the serjeants petitioned Her present Majesty to cause the legality and expedience of the document to be investigated. The petitioners urged that the mandate only contained the sign manual of His Majesty, was not sealed or countersigned; that the Crown alone had not the power to alter the constitution and practice of the Courts; that the prescriptive privileges of serjeants could only be abrogated by Act of Parliament, and that the benefits expected to accrue from the change had not been realised. The petition was accompanied by a memorial to the Lord Chancellor Cottenham, stating more at large the grounds of objection. It stated that the document was deficient in form and solemnity to give it legal effect; that the power exercised was not known to the law; that it had only lately been deemed necessary to pass an Act of Parliament to enable serjeants to be called in vacation in order to be made judges; that nothing but an Act of the Legislature could alter the distinctive character of the court, and citing authorities in favour of that proposition.

In consequence of these representations the subject was referred to the Judicial Committee of the Privy Council, and on the 10th of January, 1839, Sir William Follett opened the case for the petitioners' followed by Mr. Austin, the Attorney and Solicitor-General representing the Crown.

Mr. Austin, in the absence of Sir William Follett, finished his reply on the 9th of May, and the Court adjourned, but no judgment was ever given. However, on the 18th of the following June, the Lord Chancellor brought in a Bill for opening the Court of Common Pleas, which passed the House of Lords but was thrown out in the Commons. The question then remained in abeyance till 1846, when it was enacted by the 9 & 10 Vict., c. 54 :—"That from and after the passing of this Act all Barristers-at-law, according to their respective ranks and seniority, shall and may have and exercise equal rights and privilege of practising, pleading, and audience in the said Court of Common Pleas with the said Serjeants."

The preamble ran thus, that :—"Whereas it would tend to the more equal distribution, and to the consequent dispatch of business in the Superior Courts of Common Law, and would, at the same time, be equally for the benefit of the public if the right of barrister-at-law to practise, plead, and to be heard extended equally to all the said courts, but by reason of the exclusive privilege of serjeants-at-law to practise; plead, and have audience in the Court of Common Pleas during term time, such object cannot be effected without the authority of Parliament."

This put an end for ever to the exclusive right of serjeants to practice in the Court of Common Pleas, and threw the court open to the Bar generally. Though it does not appear how the order of precedence was arranged, as there was no Order of Council on the subject, the serjeants took rank next after the Queen's Counsel last made, but in private society a Serjeant took precedence of a Queen's Counsel. Stripped of every privilege, short of having their coif taken from them; the only refuge left was the outer bar. This indignity they suffered for some years, till, in 1864, a kind of body intermediate between the inner and outer bar, they naturally preferred to identify themselves with the former. They accordingly presented a petition to the Lord Chief Justice of the Queen's Bench to be allowed seats within the bar, with the Queen's

Counsel, which hitherto had been exclusively occupied by those having a patent of precedence. His lordship considering that similar privileges were accorded in the other courts granted the application.

According to ancient usage, when a member of an Inn received the coif in term time he was "tolled out," he becoming thereby a member of Serjeant's Inn. Although many distinguished persons have become serjeants-at-law during the last eighteen years, only three have received their promotion in term time, namely Lord Chief Justice Cockburn, Mr. Justice Honyman, and Lord Chief Justice Coleridge. A feast is generally given, the new serjeant attends in his robes as a bencher, is escorted by the treasurer and benchers to his seat, reads the grace by right of precedence, toasts the Queen, and after dinner is escorted back to the principal entrance, the doors of which on passing out are closed upon him, and the bell of the Inn tolled. In this way he ceases to be a member of the Inn, and henceforth can only be regarded as a guest of the benchers.

The domestic ceremonies observed on acceptance of the coif differs at the four Inns of Court. It is common at all the Hon. Societies that the new Serjeant ceases to be a member; the formalities differ in this respect, that at some societies he is dismissed with so-called ignominy, and is metaphorically kicked out, as in a recent instance; and at another, Lincoln's Inn, the dismissal takes the character a courteous farewell. It is usual at that Hon. Society for the new Serjeant to give a breakfast to the members of the Bench, and some chosen guests, amenities and mutual congratulations pass, the new Serjeant is presented with a purse of ten guineas as a retaining fee, in case his services should be required, a courteous farewell follows, and at the moment of the new member of the coif quitting the Hall, he is joyously rung out by the Chapel Bell, amidst the acclamations and good wishes of his late fellow members. No ceremony is observed in the Inner Temple, on the dismissal of the new Serjeant. Until 1873, it was necessary that his name be re-

moved from the books, but in that year an Order of Council was made, under which he is allowed to remain an honorary member.

We quote the following from a contemporary of the ceremony of conferring the coif upon the elevation of a Queen's Counsel to the Bench in 1856 :—

“At the opening of the court the seats were raised in the centre to permit Mr. Baron Watson, the new judge elect of the Court of Exchequer, to pass down and go through all the ancient ceremonies of pleading as a Serjeant, and taking his seat within the Bar as a Serjeant-at-Law, preparatory to being sworn in as a judge.

“The new Baron entered the court in full Serjeant's costume, preceded by Mr. Serjeant Channell and followed by Mr. Serjeant Byles, the Bar rising. The learned judges then put on their black caps, and

“Watson, Serjt., prayed a writ of right of dower for Ann Wynn, demandant, against John Scott, tenant, which was granted, and set forth the claim of the demandant to dower out of certain lands in Yorkshire in the possession of John Scott as tenant.

“Channell, Serjt., appeared for the tenant, and defended his right.

“Byles, Serjt., prayed an imparlance.

“Cresswell, J. :—Let it be so.

“Watson, Serjt., prayed that it might be recorded.

“The record was then solemnly read by one of the Masters.

“This ceremony having been gone through,

“Cresswell, J., addressing Watson, Serjt., said :—Brother, do you move anything?

“Watson, Serjt., bowed and retired.

“The next morning the learned Baron had to take the oath of adjuration, and to declare that he would not support any of the descendants of the pretender.”

The last of the Queen's ancient serjeants was Mr. Serjeant Manning, who died in 1866. Since then the offices of the Queen's Chief or First Serjeant, the Queen's Ancientest Serjeant, and the Queen's Serjeant have been vacant. By the Act 6 & 7 Vict., c. 18, commonly called the Parliamentary Registration Act, that with reference to appeals from the decisions of revising barristers, it was enacted that barristers should have equal right of practising in the Court of Com-

mon Pleas with serjeants. Proposals for the entire abolition of the office have been rumoured on several occasions. In 1857 an anonymous pamphlet was circulated by a member of the Temple, inveighing against the proposed change, and entering into an elaborate investigation of the antiquity of the order. Serjeants were always included in the commission of assize, but it has been the custom of late years to join all Queen's Counsel on the commission with the judges and serjeants, and the 13 & 14 Vict. c. 25, enables Queen's counsel and others having a patent of precedence not being of the degree of the coif to act as judges of assize for the dispatch of civil and criminal business.

The High Court of Justice Bill of Lord Hatherley (1870) did not touch the rank and office of serjeant at all. But the Supreme Court of Judicature Act passed last year by section 8 provides, that "henceforth no person appointed a judge should be required to take or have taken the degree of serjeant-at-law."

In Ireland the Crown appoints three Barristers to the rank of Serjeants who take precedence of the Queen's Counsel, except the Attorney-General and Solicitor-General. It is a patent office to which a small salary is attached. They are Crown officers, and included in the Commission. They never had exclusive right to practice in the Court of Common Pleas in Dublin. The full number in Ireland were three, but in 1627 the number was increased and one chosen from the silk gownsmen. They therefore rank higher than Queen's Counsel. The office dates from 1326. The office of King's Serjeant *Serviens Domini Regis* ceased in 1627, and that of Prime Serjeant, with an annual fee of £10, substituted in its place, which in its turn was abolished in 1805. In Charles I.'s time, the coif was granted to the judges.

LEGAL TOPICS.

THE NEW RULES.—Sir W. Harcourt did good service to the profession in moving, in the House of Commons, for a copy of the Rules and Regulations drawn up under the Supreme Court of Judicature Act. The proposed Rules, now printed by order of the House, will not, it may be presumed, undergo any material modification until they are laid before each House of Parliament by the Judges. An opportunity is thus afforded to the profession of carefully considering the new practice before it comes into operation, and of meeting the altered state of things which will then arise after full preparation. On the other hand, if there are any points on which reasonable doubts may be entertained as to the exact nature of any of the Rules, and their precise practical effect, amendments may be introduced before the final step is taken. Speaking with all due diffidence after the first reading of the Rules now printed, we do not anticipate that the number of suggestions relating to important alterations is likely to be very large. The Rules have been framed with a full perception of all the bearings of the Supreme Court of Judicature Act, in reference to practice and procedure, and they are likely to be free from any patent ambiguities in the apprehension of those who understand their scope and object. We may mention, however, a defect which we hope will be supplied before the Rules are finally issued. There is no form in the Schedules of the manner in which the statement of claim or the statement of defence is to commence. Is the former to be addressed to the Lord High Chancellor of Great Britain, and to begin with "Humbly complaining, sheweth unto his Lordship, A. B. of L." or is it to commence "A. B. by G. F. his solicitor, sues C. D."? Or may it be in either form, or in any other form, or without any form at all? It is necessary for ordinary convenience to have something to show *ex facie* what is a statement of claim and what a statement of defence, and it is certainly desirable that a uniform mode should be observed in the different divisions of the High Court. Let it be "The plaintiff's statement of claim is as follows," and "The defendant's statement of defence is as follows." Or let there be merely a heading "Statement of claim," or, "Statement of defence," &c. Something of the sort is clearly necessary, and it is necessary also that the same forms should be adopted by all equity draftsmen and special pleaders. Such things may not be of much importance in themselves, but in the perusal of written or printed papers, they serve to catch the eye, and this is an immense practical

convenience. If our last suggestion, is what it would appear, is intended by order XVIII., Rule 4, it would be well to say, that no formal commencement shall be used in pleadings. There is another matter to which at present we can merely allude. We see it is provided (Order 1, Rule 1.) that with respect to actions on Bills of Exchange commenced within six months after they have become due, the procedure under the Bills of Exchange Act is to be used. We have found no rule providing for the retention of proceedings in ejectment by landlord for non-payment of rent, or against tenants holding over after expiration of term, under the Common Law Procedure Act, 1852. Has the effect of this been sufficiently considered?

HOMICIDE LAW AMENDMENT BILL.—The Select Committee to whom the Homicide Law Amendment Bill was referred have agreed to the following special report :—

Your committee have examined Mr. Justice Blackburn and Baron Bramwell, and have received' from the Chief Justice of England a letter containing an elaborate criticism of the Homicide Law Amendment Bill. They have also examined Mr. Stephen, Q.C., by whom the Bill was drawn.

It has been strongly urged before your committee that partial codification is a mistake, and that no measure should be passed till the whole of that branch of the law to which it belongs has been reduced to a series of simple and abstract positions. Your committee think that such a doctrine would be fatal to the prospect of producing any code.

At the same time, they observe that in the Bill before them there are many provisions which are not peculiar to the law of Homicide, but extend to almost every sort of crime, and that there are others which are common to homicide and to other injuries to the person. It may be that the best way of commencing a penal code would be to deal first with such rules of law as are common to all or to large classes of crimes, and thus at once to avoid needless repetition, and to place the whole doctrine of criminal responsibility on a clear and intelligible basis.

The subject referred to your committee is of the highest importance. The responsibility of declaring the terms on which it shall be lawful to take the life of a fellow creature, is the most awful that can be undertaken. It should not be adventured on as a test or experiment, but should be reserved till the method of codification has been perfected by numerous trials on less momentous subjects.

The subjects best adapted for a code are obviously those in which the law is most technical, where its definitions are most accurate, and the terms it employs are furthest removed

from the loose and careless vocabulary of common life. With such terms it is comparatively easy to construct abstract legal propositions. But in the case of homicide, we have to deal not with technical terms, but with ordinary language, which is quite intelligible when used by a judge in directing a jury on a state of facts proved before them, but which when reduced to abstract propositions becomes obscure and ambiguous from the want of particulars to which the proposition applies, and from the want of a clear definition of the terms used. These terms, such as "causing death without actual injury to the body," "causing death by 'a course of conduct,'" "an act by which death is caused, which would not have caused death but for intermediate events, not its consequences," and so forth, would doubtless ultimately have a fixed and technical meaning given to them by judicial interpretation, but in the meantime would, it may be apprehended, rather serve to provoke than to remove controversy. It would seem that a code aiming like the Homicide Bill to reduce a large and complicated subject to a few abstract propositions, can hardly be made intelligible to the non-legal mind without the use of illustrations, by putting particular cases, an important innovation which your committee recommend to the favourable attention of the House.

It has been urged with great force that the law of homicide requires codification more than any other, because it is not to be found in books or statutes, but in a kind of oral tradition and understanding among lawyers, which is only acquired by practice. But if this be so, it furnishes a conclusive reason against commencing to codify with the law of homicide, and above all against delegating such a duty to a select committee of the House of Commons. To make a code is a work of compression, simplification, and arrangement. It assumes the knowledge of the law by the codifier; but in order to codify the law of homicide it is necessary first to declare what it is, and that is impossible, as it seems, to any but practising lawyers, for the reason stated above. It is better surely to begin with that which is easily ascertained than to select a subject where we must take upon ourselves to declare the law first before we co-ordinate and condense it.

The law of homicide requires very considerable alterations in substance before it is reduced to its simplest form, and made permanent in a code. We are required to declare that negligence is not manslaughter, and that suicide^c is not murder: both, probably, salutary changes, but which should be settled on their own merits.

The existing definition of murder, which may be roughly stated as killing with malice aforethought, is far too narrow,

and the defect has been supplied, not by re-defining the crime, but by subtle intendments of law, by which malice is presumed to exist in some cases where the action is unpremeditated, and even in some cases where death is caused by accident. It is most desirable that a state of the law under which people are condemned and executed by means of a legal fiction should cease. But such a change, however urgently required, is, in the opinion of your committee, not a matter for them, but rather for the law officers of the Crown assisted by the advice and fortified by the sanction of the highest legal authorities, after mature and careful deliberation. Nothing would be more likely to impede, or, indeed, utterly to frustrate the work of codification than the suspicion or the certainty that, under the pretext of simplification and re-arrangement, great and important changes were effected which had never been brought in a clear and simple way to the notice of Parliament.

For these reasons your committee are of opinion that it is not desirable to proceed with the present Bill, notwithstanding that this experiment in codification has been presented to them with every advantage that learning and skill can give it.

Finally, your committee earnestly recommend that the attention of the Government and of Parliament should be directed to the present imperfect state of the definition of the law of murder. They believe that they have collected materials from which a re-definition of murder can be produced, and they are convinced that such a definition is urgently needed, not only to rescue the law from its present discreditable state, but to give clear notions to the public at large of the real nature and extent of this crime, and to prevent the confusion often created in the minds of jurors by an appeal to the doctrine that murder cannot be without malice aforethought, which it is not always easy for the judge to remove. If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical.

TESTIMONIAL TO A PUBLIC OFFICER.—An interesting meeting took place on the 6th ult., at the Law Institution, on the occasion of the presentation of a testimonial to Mr. Thomas Wolfe Braithwaite, of the Record and Writ Clerk's office in Chancery, who, as the memorial set forth, for more than thirty years, has discharged with eminent efficiency, fidelity, and zeal, and with never-failing courtesy and kindness, important services in the office of Clerk of Records and Writs of the High Court of Chancery. The chair was taken by

Mr. W. S. Cookson, who handed to Mr. Braithwaite a book recording the names of the gentlemen who had contributed, and a cheque for 350 guineas, observing that, "I think nothing can be more gratifying to a public servant who has grown grey in the discharge of his public duties than to receive such a testimony from men with whom he has been in constant, almost daily, intercourse of their esteem for him and their appreciation of him as a good and faithful public servant, and as a man whom they are proud to class among their friends." Mr. Braithwaite, having referred to the kindness and courtesy he had received from the profession, thanked the meeting most sincerely for the honour it had done him.

THE RIGHT HON. ABRAHAM BREWSTER.—It is our painful duty to record the demise of the Right Hon. Abraham Brewster, which took place at his residence, in Merrion Square, on July 26. He was born in the year, 1796, so that he had lived 78 years. He was son of William Brewster, Esq., of Ballynulta, in the county Wicklow, a member of an English family, whose ancestors apparently settled in Ireland about the time of the Protectorate, as soon after that date there is mention made of a Sir Francis Brewster, acting as one of the Commissioners of Fortified Estates on the Restoration of Charles II. Abraham Brewster entered Trinity College, Dublin, in 1812, and took his degree in 1817; but his college career was not a brilliant one. He was called to the bar in 1819, and was married in the same year to the daughter of Mr. Robert Gray, of Upton House, county Carlow, by whom he had issue a son and a daughter, both of whom predeceased him. Although his reputation throughout his long career was that of a hard-working lawyer, he was seventeen years in practice of his profession before he was called to the inner bar. He received silk in 1835, while Lord Plunket was Lord Chancellor. In 1842, during the Attorney-Generalship of the late Lord Chancellor Blackburn, he was appointed Castle adviser under Lord De Grey's administration. In 1846 he was elected a bencher of King's Inn, and in the same year was appointed Solicitor-General for Ireland during the Viceroyalty of the late Earl of Bessborough, who died in the Government in 1847. On the return of the Conservatives to power in 1853, Mr. Brewster was appointed Attorney-General for Ireland, and sworn member of the Privy Council. He continued Attorney-General till the dissolution of Lord Aberdeen's Government in 1855, when, although solicited by Lord Palmerston to continue in office, Mr. Brewster thought fidelity to the Peel party necessitated his refusal, and he accordingly returned to

his profession. He was succeeded in the official position by the present Judge Keogh, who had acted as Solicitor-General under him. In 1866, when the party were again in occupation of the Treasury benches, Mr. Brewster (thirty-one years after he had received silk) was appointed Lord Justice of Appeal, in succession to the late Rt. Hon. Francis Blackburn, who for the second time had been elevated to the Lord Chancellorship of Ireland. Again in 1867, on the retirement of Mr. Blackburn from the Chancellorship, Mr. Brewster succeeded to the judicial honours vacated by his early friend and patron. In December, 1868, he sat in the Court of Chancery for the last time, having relinquished office on the resignation of Mr. Disraeli's Government, when he was succeeded, on the accession of Mr. Gladstone, by Lord O'Hagan. It is said that early in the present year he would have been appointed Lord Chancellor of Ireland by Mr. Disraeli, but that he made it a condition that, if he again accepted the office, it should be accompanied by a peerage. This probably would have been conceded, but that Mr. Brewster—so it is rumoured—stipulated for remainder to his grandson, the issue of the marriage of Miss Brewster with Mr. French, and who, we believe, will inherit the greater part of the enormous fortune amassed by his grandfather. His only son entered the army, and served with distinction in the Caffre war, under Sir George Cathcart; but perhaps he was better known as the popular Colonel Brewster, who for some years commanded the Inns of Court Rifle Volunteers. Mr. Brewster, though an active politician, never sought Parliamentary honours, but was one of the few fortunate lawyers who have risen to judicial eminence through professional services alone. He was a member of the Leinster circuit; and while at the bar took part in almost every *cause celebre* heard at Nisi Prius during the period of his forensic practice. In the celebrated case of *Hancock v. Burke*, he and Mr. Keogh, then Attorney-General, now judge—were opposed to the late Marquis of Clanricarde, and the bitterness of his invective on the occasion caused, for a great many years, the severance of a friendship which had long existed between Lord Clanricarde and Mr. Brewster. In the notorious Yelverton marriage case, Mr. Brewster was counsel for Major Yelverton, and Mr. Whiteside, now Lord Chief Justice of Ireland, was the lady's champion. In equity, also, he was held in high estimation and enjoyed extensive practice. By the prosecutions of the Six-mile-bridge noters, during his Attorney-Generalship, Mr. Brewster incurred some obloquy; but his management of the public business was always honest, firm, and unswerving, and no imputation of favouritism was ever made against him. Though not a brilliant or

eloquent orator, Mr. Brewster was a persuasive and effective speaker. As a lawyer, he was possessed of great acumen and sound attainments. But it was in tact and the general management of cases, in the mastery of complex facts, and skill in grouping and massing them, in the knowledge of human nature, and in the application of strong common sense and sagacity, that he eminently excelled; while such was the readiness of his legal resources, that it was almost impossible to take him by surprise in what Lord Coke calls the 'occasion sudden' of *Nisi Prius*; interruption by bench or bar seemed only to give him additional strength, nor did he even experience inconvenience from any unexpected derangement of a pre-organised line of argument. As a judge, however, it must be confessed that his temper was not at all times placid; and, though his decisions were generally recognised as sound, they were undistinguished by any special manifestations of power. From a recently published memoir of the deceased we take the following remarks:—'Mr. Brewster's career is more or less identified with the public history of the country, with the leaders of the various Governments, and with the public men of the period, for nearly half a century. His management of the public business when at the Castle, and during his official career, was firm and resolute, and no imputation ever rested on him of favouritism to one party more than to another. It is especially remarkable that of a man so largely engaged in professional business, so long connected with the public life of the country as Mr. Brewster, there remains nothing but a tradition. There is no wonderful speech on record, no singular effort of statesmanship or legislation identified with his name. To be sure Mr. Brewster never had a seat in Parliament, but he must have been consulted by almost every statesman of either party who has had ought to do with Irish affairs during the last forty or fifty years. Though in his early career he was a stout and uncompromising Tory, Mr. Brewster separated himself from that party on his assuming office in the Aberdeen Government, and became more or less in accord with the Liberal politicians, and so when he was created Chancellor by the Disraeli Government the Conservative party represented that his promotion should not have proceeded from their political friends. Those who have been contemporaries of Mr. Brewster can speak of the strength and power of his handling of cases at either side of the hall of the Four Courts, the incisive force of his points, the weight of his argumentation, and his preparedness for every emergency. Whether it were a new trial motion, a bill of exceptions, or a dry legal argument, he was ever ready, ever fortified; and when he gave

up Common Law business, and confined himself to Chancery, he assumed and took the lead of that Court, which he maintained till the repose of the bench gratefully rewarded him. He was a master of examination and cross-examination of witnesses; and there is told how, on one occasion, being engaged in a case in Court, arising out of a contested election for the county of Carlow, at which he had been counsel for the Conservative candidate, he was cross-examining a witness who was answering him with the most cool effrontery as to the facts which the counsel was personally cognisant of, and which had occurred in his presence at the election and in the presence of the witness, when, becoming somewhat irritated at the unblushing falseness of the witness, he took his wig off, and then put the crucial question to the witness, "Did you ever see me before?" The witness had not identified him in his wig, but the moment the query was put, and the witness looked at the questioner, he jumped off the table and precipitately left the Court. Mr. Brewster was somewhat merciless in his advocacy: he seems to have been of a like opinion with Lord Brougham, that an advocate should know no one but his client, and to sustain that client's case he was bound to sacrifice all other considerations. The late Lord Chief Baron said of him, on one occasion, that he had addressed more juries than any man of his standing in the profession. Indeed, at a subsequent period, it was said that there were scarcely any cases in which he was not engaged on the one side or the other, and that no barrister ever held so many special retainers. His name, though not that of one of the greatest ornaments of the judicial bench, will be remembered hereafter as, at all events, that of one of the greatest Irish advocates of our century.'—*Irish Law Times*.

BOOK REVIEWS.

A COLLECTION OF THE CASES DECIDED UNDER THE 2ND SECTION OF THE RAILWAY AND CANAL TRAFFIC ACT, 1854, AND REPORTS OF CASES DECIDED BY THE RAILWAY COMMISSIONERS UNDER THE REGULATION OF RAILWAYS ACT, 1873, with the Statutes and Notes: also a Digest of Cases on Railway and Canal Traffic. By Ralph Neville, M.A., of Lincoln's Inn, and Walter H. Macnamara, of Inner Temple, Esqrs., Barristers-at-Law. (London: Henry Sweet, 1874.)—This is likely to be a most useful book, if the Court, to which the jurisdiction of the Court of Common Pleas under the Railway and Canal Traffic Act, 1854, was transferred by the Act of last Session, is really to be of service to the public. The Court has, as yet, had only very few cases to decide, but the way in which it has dealt with them is well calculated to inspire both the public and Railway Companies with con-

fidence, and cannot fail to command respect. We see, too, that an Act has passed through Parliament which empowers the Board of Trade, in all cases in which any difference between Railway or Canal Companies has to be referred to an arbitrator appointed by that Board to appoint the Railway Commissioners, and we shall, therefore, expect to see a good many cases like the *Buckfastleigh, Totnes, and South Devon Railway Company v. The South Devon Railway Company*—which is reported in the volume before us—coming before this well constituted and most capable tribunal.

This work is a careful compilation. It contains all the English and Scotch cases which were decided under the 1854 Act in the Courts of Common Pleas and Session, and also all the cases which have come before the Railway Commissioners. The statement of these latter, for which the authors are responsible, is clear and full. The volume also contains a careful, and what will doubtless be a valuable digest, of cases relating to railway and canal traffic. The notes are always judicious. On the whole, the authors are to be congratulated upon the production of a useful work, and as we see that they contemplate the publication at intervals of the decisions of the Railway Commissioners, we shall hope to hear of them soon again, for we cannot but look upon that commission as a very important protection of public rights and interests, against what might become the tyrannous monopoly of large and powerful companies, and, at the same time, as a useful means of preventing irritating exactions upon the part of the public. It is a Board which may well, from the nature of its constitution, easily and quickly dispose of heavy arbitrations, and we saw, the other day, a report of a case which was disposed of before the Commissioners in six or seven days, which had failed to be disposed of before a railway Secretary in as many years, and we cannot but think that in time it will become customary for the judges to refer many matters connected with railways to this tribunal. If we are right in this surmise then there will be enough of work for the Railway Commissioners, and many cases which the authors of the work before us, who have thereby shown their competence and capacity, may well and usefully report.

THE BENCH AND BAR REVIEW.—THE FORUM. Volumes might be written under such a title as "The choice of a name" addressed either to baptismal sponsors or the Editorial World, and, in the latter case, the experience of the editor of a new American periodical, the first number of which has appeared under the name of "The Bench and Bar Review," and the second number under the name of "The Forum" should be included in it. The reason for the change of name is briefly stated in a notice attached to "The Forum," and is the existence of an older publication of the same name. It is a pity that this should have occurred, for there are so many articles of interest in "The Bench and Bar Review" that any one who had seen the first number would very likely look out for the second, and might not discover it under its new name.

The "Bench and Bar Review" contains a brief but interesting

sketch of the life of Caleb Cushing, and several articles of serious interest on the Civil Law, the responsibility of Life Insurance Companies for the acts and representation of their soliciting agents, recent decisions in England and the United States, and an abstract of the English Reports; yet the presence of a certain amount of nonsense is permitted in at least two places. We refer to Article No. 4 "William Pinkney at Bel Air," and to "Potiphar v. the Commonwealth" in the "Green Bag."

The members of both branches of the legal profession in England are, we believe, generally supposed to enjoy a good joke, a good story, or a good dinner, but such absolute trash as Potiphar v. the Commonwealth is scarcely likely to amuse persons who could read and understand the dryer parts of the number, or appreciate the wit of the "poem" in the first part of the "Green Bag."

William Pinkney at Bel Air is amusing but incredible. There are "sprees" and jovialities on the English Circuits, but we venture to say, that an English judge with a blanket wrapped around him like an Indian, his face painted, a red handkerchief round his head, slippers on, a candle in one hand and a bottle in the other would scarcely proceed at 12 o'clock at night, accompanied by the "lawyer" similarly attired, and armed to knock up the ex-sheriff, arouse a household from their beds by "a most awful yelling," and make a lot of schoolboys drink all round, and continue a series of pranks far on into the night. We find the story difficult to believe.

It appears from the "Green Bag" of the Forum that there are other persons in existence who hold a similar opinion, but the editor of the Forum is not among their number. No doubt there are many stories current concerning members of the English bar, which have only a slight foundation in fact, but these stories have maintained their currency on account of their quality. This extraordinary legend may descend to posterity on account of its extravagance, but we imagine will not do so on account of its authenticity, as at present proved.

The second number, "The Forum," contains several articles of the serious class, and these are all good; but the amusing portion in this number is much better and more readable. It is to be found in Article No. 3, "The Forum and its Chances," which is a review of a book by our own Horace Twiss—*The Public and Private Life of Lord Chancellor Eldon*—but of this we ought not to say much as some of the biographical details have already appeared in the *Law Magazine*.

We think it not at all improbable that the "Forum" will establish a reputation in this country for its essays on legal questions, but one of its "important features"—the recent division—will probably be better appreciated in America than in England. We shall look forward with interest to the continuation of the series of critical reviews of lives and characters of distinguished jurists and lawyers, in which such names as Caleb Cushing and Reverdy Johnson already appear.

THE AMERICAN LAW REVIEW, April, 1874, July 1874. (Boston: Little, Brown and Co.)—These are the 3rd and 4th quarterly Nos. of the 8th Volume of this very ably conducted Magazine. In the number for April, there is an abridgment of the celebrated Tichborne Trial, *Reg. v. Castro or Orton or Tichborne*, which reproduces with admirable brevity and not infrequent humour the connected story of that trial and its diverting incidents. The writer is evidently a person imbued with a grand regard for our own much exteemed Lord Chief Justice, to whom he alludes as one whose acerbity of temper is well known on both sides of the Atlantic. In ushering in Kenealy, the writer is particularly droll: "The case for the prosecution being closed, Dr. Kenealy on the 22nd day of July arose to open the case for the defendant. He obtained leave to remove his wig on account of the excessive heat; and forthwith plunged into an harangue which is in many respects so extraordinary as to show that this precaution for keeping his head cool had been neither superfluous nor altogether effective." Altogether we have not seen this Tichborne "novelette" told in a manner at once so little biassed and so humorous. In the number for July, there are articles of a different sort, the three principal being respectively entitled "Fraudulent Misrepresentations of Agents," "The Three Degrees of Negligence," and "Testamentary Powers of Sale." Each of these articles is characterised by vigour, freshness, and originality, while at the same time accuracy of statement, patience, and research are not deficient. We have frequently praised this publication in former notices; and certainly the two numbers now before us are not inferior,—but if anything they are superior, to their predecessors.

A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, embracing Mandamus, Quo Warranto, and Prohibition. By JAMES L. HIGH. (London: Stevens and Haynes; Chicago: Callaghan and Co., 1874.)—The number of monographs on questions of practice is increasing at an alarming rate. A few years ago we were content with general books of practice and a few works on the all-important questions of pleading, now we have detailed treatises, sometimes in several volumes, on the law and practice of injunctions, under the Companies' Acts, and on similar subjects. No doubt the demand for works of this class is caused by the inability of the practising lawyer to digest for himself the reported cases which each month adds to legal literature, but the fact shows the necessity of occasionally wiping out the past by recasting the decisions of a given period in an authoritative form, so that the lawyer may have a periodical burning of reports and similar ephemeral literature.

The practice of what may be called international citation is regarded with less favour in this country since Mr. Justice Story's works have fallen into comparative neglect. And the reasons against the practice are strong. Except in questions of general principles, where it is of great advantage to be able to compare

the thoughts of many minds, the citation in an English Court of decisions on concrete points by a tribunal influenced by a different mode of social existence and by different analogies, can hardly have any effect beyond burdening the mind and the library of the lawyer with materials of doubtful value. These objections especially apply to questions of practice, where the principal objects to be aimed at are certainty and convenience, and comparative jurisprudence (excellent in its proper place) must always be at a discount. The law of mandamus is a striking instance of a divergence between the English and American systems of procedure, which makes the decisions of one country almost valueless in the other. The writ of mandamus being originally a prerogative writ, the nature of the proceeding had to be changed to adapt it to the functions of the American courts, none of which can be said to represent the sovereignty of the country, as is the case with our Court of Queen's Bench, and consequently "the writ has, in the United States, lost its prerogative aspect, having come to be regarded much in the nature of an ordinary action between the parties." Again, in America the relation between the State and Federal Courts has given rise to a more frequent use of the proceeding by mandamus in questions of jurisdiction than has been the case in England, and the extension, by the Common Law Procedure Act of 1854, of the cases to which the writ of mandamus is applicable, has made the dissimilarity between the English and American procedures tolerably complete. The same remarks apply, *mutatis mutandis*, to the subject of Quo Warranto and Prohibition. Thus the author himself says: "In this country [America] the principles governing the jurisdiction under discussion have been somewhat confused, by the failure of many of the courts to properly discriminate between the original or ancient writ of Quo Warranto, and the information in the nature of a Quo Warranto, and the terms have been used often as synonymous and convertible terms," and the peculiar system of official appointments in America has caused the proceeding by Quo Warranto to be "more frequently invoked for the determination of disputed questions of title to public offices, in this country, than for all other causes combined."

It follows from what we have said that the present work is one from which the ordinary English lawyer can hardly derive much benefit. To judge from internal evidence, we think that Mr. High's book is worthy of all praise. It is painstaking, written with great clearness, and, if the number of cases cited be any criterion, exhaustive; the author has of course bestowed his principal care on the American cases, and from the omission of several important modern English ones we may conclude that he has found it an unprofitable task to attempt to amalgamate the two systems. The historical part of the book, however, may be studied with much advantage by the English student, and in its native country the book will, we hope, meet with all the success which it deserves.

A TREATISE ON THE LAW OF COPYHOLDS AND CUSTOMARY TENURES OF LAND. By CHARLES ELTON, of Lincoln's Inn, Barrister-at-Law. (London: Wildy & Sons, 1874.)—The object of this Treatise is to provide a short and convenient hand-book of Copyhold Law, as at present existing and in practice, disencumbered of matters that are of a purely historical or merely archæological value. The author does not, however, discard historical matters, when these tend to throw light upon the existing law, and accordingly in his first or introductory chapter he goes into the origin of Copyhold and customary tenures at considerable but not undue length. The intrinsically valuable part of the work begins with chapter ii., in which the nature of estates in copyholds is considered, and is continued through chapters iii. and iv., in which the manner of conveying copyholds is discussed with equal detail and accuracy. The descent of copyhold lands upon the death of the owner intestate, together with the minor incidents of copyhold tenure, occupies the three succeeding chapters. The eighth or next following chapter consists of an enumeration and explanation of the divers commonable rights annexed to the lands of manors. A large portion of the volume is occupied with the methods of enfranchisement compulsory and voluntary, the statutes authorizing and regulating the same, and the forms to be observed. The work of Mr. Rouse had already proved of value in the last-mentioned respect, but any new work upon this branch of practice is desirable, were it only for comparison of the various forms; and Mr. Elton's work, besides affording facilities for such comparison, contains also certain forms and precedents which we have not before observed in any of the earlier treatises. Mr. Elton does not pretend to be a substitute for Scriven; but the humbler aim which he has in view, is a most useful one, and is also in our opinion very happily accomplished. The Index with which the volume concludes is a very copious one, and so far as we have been able to test its accuracy, it is exact.

In chapter x., which is devoted to the consideration of the evidence regarding copyhold and customary rights, we have found the principles of the well-known cases of *Calmady v. Rowe*, 6 C. B., 861, and *Beaufort (Duke) v. Swansea (Mayor)*, 3 Exch., 413, very correctly stated; but we regret to find no mention in that chapter (or, indeed, in any part of the volume) of *The Ipswich Foreshore Case*, *Ex parte Tomline*, in which the late Vice-Chancellor Wickens, after mature consideration, delivered a most exhaustive judgment, in which he passed in review the whole law of evidence as stated in the older cases. We have found, however, the recent case of *Reg. v. Garland*, L. R., 5 Q. B., 269, properly referred to on pp. 88 and 275; and generally, all the more recent cases may be said to be conscientiously noted up.

LEGAL JOURNALISM.—Of the *Law Times* nothing can be added to its reputation for miscellaneous completeness, except that in a recent number an extra sheet was given in order to furnish the

subscribers with the entire new rules under the Judicature Act. The *Irish Law Times* has much improved of late. It contains well selected material to keep its readers awake to what is going on in the profession. The *Journal of Jurisprudence and Scottish Law Magazine* contains articles on legal subjects, interesting to both the English and Scotch lawyer. The law of Master and Servant has been freely discussed in its pages, and an interesting series of memoirs of Scotch lawyers at intervals appear. The *Canada Law Journal*, too, appears to have made a move. The reports of cases are very well done. The *Central Law Journal* published at St. Louis, is evidently making way. Besides the reports, it contains a variety in legal information. The *Albany Law Journal* still holds its own, and continues to furnish the profession with well digested articles on legal subjects, both light and heavy.

JUDGES' CHAMBERS.

THE recommendations of the judges as to circuits are these :—

I. The circuits of the judges shall be as follows :— I. The North Western Circuit, which shall include the counties of Westmoreland, Cumberland, and Lancaster. II. The North-Eastern Circuit, which shall include the counties of Northumberland, Durham, and York. III. The Midland Circuit, which shall include the counties of Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford. IV. The Norfolk Circuit, which shall include the counties of Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, and Sussex. V. The Oxford Circuit, which shall include the several counties and cities heretofore included in the Western Circuit. VI. The Western Circuit, which shall include the several counties and cities heretofore included in the Western Circuit. VII. The North and South Wales Circuit, which and each of the divisions whereof (that is to say, the North Wales and the South Wales divisions) shall include the several counties heretofore included therein respectively, but two judges shall hold the assizes for the county of Glamorgan instead of one.

2. No assizes shall be held in or for the county of Surrey.

3. The judges of assize for any county or city may, by order, adjourn the opening of such assizes at any time, and for such period as they may deem to be necessary or expedient.

ADMISSION OF ADVOCATES IN BENGAL.

The following Rules of the High Court of Judicature at Fort William in Bengal have been made for the purpose of regulating the admission of Advocates, and are now in force :—

1. Any person who is entitled to practice as a Barrister in England or Ireland, or as an Advocate in the principal Courts of Scotland, may be admitted as an Advocate of this Court.

2. Every person applying under the aforesaid rule to be admitted as an Advocate of this Court, must produce a certificate, showing that he is entitled to practice as a Barrister in England or Ireland, or as an Advocate in the principal Courts of Scotland, together with satisfactory testimonials to his good character and ability

3 The mode of applying to be admitted as an Advocate of this Court shall be by letter, stating the date on which the applicant was called to the Bar, whether it is his intention to practice in this Court, and [in the case of an applicant who claims to be entitled to practise as a Barrister in England] the number of Terms kept by him. The letter shall be addressed to, and left with, the Registrar of this Court, in its original jurisdiction, together with

(1.) The certificate required by Rule 2

(2) Testimonials to character and ability

4 The Registrar shall circulate the letter with the other documents to be left with him, to the Chief Justice and Puisne Judges

5 Every person, on being admitted and enrolled as an Advocate of this Court, may, without the payment of any fee besides the admission fee, obtain a certificate of admission under the signature of the Registrar and the seal of the Court

6. Any Advocate of this Court may, on the payment of a fee of Rs 5 [to be paid by means of Court fee stamps], obtain a certificate under the signature of the Registrar and the seal of the Court, that his name is borne on the roll of Advocates of this Court

7 The Registrar of this Court, on its original side, shall have the custody and care of the rolls or books wherein persons are at present enrolled as Advocates, and shall enrol the name of every person who shall be admitted an Advocate, with the date of his admission in *alphabetical* order in a roll or book to be kept by him for that purpose, to which roll or book all persons shall have free access without fee or reward

APPOINTMENTS

Mr. Thomas Irwin Barstow, of the Northern Circuit, has been appointed Magistrate at Clerkenwell Police Court, Mr R G Raper, solicitor, Chapter Clerk, Mr E Loughlin O Malley and Mr. Arthur Collins, Revising Barristers —*Scotland* — Mr William Watson has been appointed Solicitor General, in the room of Mr John Millar, appointed one of the Lords of Session, Mr A Forbes Irvine to the vacant Sheriffship of Argyleshire, and Mr Charles Scott succeeds Mr Irvine as Clerk of Justiciary —*Africa* — Mr. D P Chalmers has been appointed Queen's Advocate for the Gold Coast

THE
LAW MAGAZINE AND REVIEW.

No. X.—VOL. III.—OCTOBER, 1874.

I.—LAW REFORM AND CODIFICATION.

By JOHN P. O'HARA.

THE Lord Chancellor announced, on the second reading of the Statute Law Revision Bill, in the House of Lords,* that a proposal for a code would be submitted to Parliament next session. This declaration has revived the interest which attached to the Law Digest Commission before its last collapse, and also suggests several preliminary considerations.

The subject of law reform presents three distinct phases. Of these not the least important is concerned with procedure. That question, indeed, was intended to be disposed of by the Judicature Act of last session; and, certainly, if the rules framed under that enactment prove finally to be in accordance with its main intent, there will be but little room left for further amendments in that department of law. A change of procedure is entirely separate from substantive or formal reform of the law itself. Codification, or formal reform, is also distinct from organic change. But, as all extensive repairs usually involve more or less of a deviation from the plan of the original edifice, formal and substantive amendments of the law may be conveniently undertaken or reviewed together. We shall, therefore, first of all, offer a few brief comments on the relations of procedure to substan-

* *Vide The Times*, June 10th, 1871.

tive doctrine ; for there are still some misconceptions afloat with respect to the necessary results of a fusion of law and equity. We shall next sketch at some length the relations of codification to law reform. The best mode of preparing either a code or digest will then be considered by us, and compared with the methods pursued by the Digest and Statute Revision Commissioners respectively. We believe we shall be able to demonstrate that there is no serious obstacle to compiling a code founded on the best principles of our own jurisprudence, and yet entirely free from the uncertainty that attaches to fresh legislation. Finally, the authority to be given to the code and its relations to judicial and professional labour will be treated of in this article. The whole subject may seem, on first consideration, to be abstruse and complicated ; but, when closely examined in its separate parts, it will be perceived to be free from any very embarrassing difficulties. Ravines will be found to divide the hills that now appear to form a continuous range, and a careful survey will suggest many helps for performing the journey. The hardships of the way, too, may ultimately prove to savour more of fact than of law, and to be occasioned rather by the quantity of matter to be digested than by the supposed intractable and peculiar nature of the jural baggage.

American Codification.—Much has been already achieved in this path not only in the old world but also in the new. Indeed, recent British progress in legal reform, although considerable in itself, seems retrograde if contrasted with the more rapid action of several of the United States of America. Commissioners have recently been appointed either to consolidate the statutes, or to codify the laws, of the following States :—Florida, Georgia, Illinois, Iowa, Michigan, Mississippi, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin. New York has also had its statute laws recently consolidated, as the legislature refused to adopt the civil code presented to it in 1865. The statutes of the Federal Government, too, have been revised and consolidated within the last

few years. The Commissioners distributed their work into several portions, to be prepared by each Commissioner respectively, but to be revised by them jointly at Washington. They began by taking up the last statute on a particular subject, and afterwards examined the preceding enactments on the same head. This seems to be the best mode of consolidating either statutes or cases; for their importance is usually in inverse proportion to their antiquity. The Federal Commissioners have also illustrated leading propositions by appropriate citations of cases. So much of their work as we examined appears to have been performed with care and skill.

Revising or consolidating commissions have completed their allotted tasks in Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, and New Jersey. Proposals for codification have lately been brought before some others of the States, especially Arkansas, Connecticut, Delaware, Nevada, Texas, and Virginia, and it is probable that effective action will be taken in these States for carrying out the proposed schemes. There has thus been throughout the breadth and length of the United States a sort of Jural revival which ought to impart confidence and animation to the less active law reformers of Great Britain.

Fusion of Judicatures.—The Digest Commissioners have unfortunately fallen from a state of sanguine and undue confidence into one of despair; instead of working, as at first, without wisdom aforethought, they will not now work at all. Like those philosophers who despised all systems of culture that fell short of absolute perfection, they seem to have considered it unlawful and idolatrous to bow their heads before any type or representative of precept whose origin could not be clearly traced to High Olympus. As good lawyers often prove to be indifferent judges, so the judicial mind does not appear to be sufficiently experimental and tentative for law reform: or, perhaps, a latent sense of the paramount urgency of the claims of procedure induced them to stand still while the Judicature Commission was

carrying out its more urgent schemes. Good procedure is undoubtedly more important than good laws, for the same reason that a good appetite with indifferent food is better than the best banquet with a weak digestion.

"Whate'er is best administered is best."

Of what use would the Habeas Corpus Act be, if administered by corrupt judges? What could a Denman or a Campbell do for a suitor, if the delays incidental to procedure baffled the Judges' utmost endeavours to bring a suit to a speedy termination? What is the good of a perfect system either of Common Law, Equity, or Admiralty procedure, if a litigant cannot readily know upon which arm of the sea of troubles he should enter, and if, owing to a division of professional labour, his legal adviser is really in a similar dilemma, though he gives his own leather factory the benefit of the doubt. It has been, therefore, a great blessing that our procedure was attended to before the substance of the law itself was submitted to any severe or searching process of reform. The Judicature Act, 1873, indeed, is thought by some to have aimed at a wide-spread amendment of doctrine.* If the statute has this effect, it will be a sample of the mode in which further legal amendments ought to be carried out. Thus interpreted, it furnishes the correct ideal of legal expurgation, which is the first step both towards codification and reform. The judges, however, are likely to determine that the Act of 1873, so far as it merely consolidates Judicatures, makes no change whatever in substantive law, if legal interests alone are in question, nor even where equities are concerned, except that every court will have for such cases all the powers of the Court of Chancery. This circumstance alone would, even without express provision on the point, imply that an equitable right should prevail over a legal one.

Procedure is as distinct from legal doctrine as a highway is from the vehicles and commodities that pass over it. No change in the one can *per se* affect the other. A fusion of

* *Fide* 36 & 37 Vict., c. 66, ss. 24, 25, par. 11.

law and equity means merely an amalgamation of procedures, and not the extinction of legal interests, except where there is a paramount equity and the beneficiary is *sui juris*. The Act of 1873, so far as it amalgamates tribunals, merely prevents a demurrer being taken to the jurisdiction. Indeed, this shortening of the road is of little moment, if the old tolls are still to be levied on the wayfarer. Now, if the specialties of pleading are perpetuated under the new rules, a suitor using an erroneous form must pay the costs occasioned by his error. It is, therefore, to be hoped that the new rules will not admit of many mistakes of this kind being committed. In fact, a simplification of pleadings is still more important than a consolidation of judicatures.

Equity pleading required to be thoroughly overhauled. The system of taking evidence by means of a sworn answer and by affidavits was absurd in the extreme, and has now been very properly ostracised. Evidence so prepared and cooked to order was hardly worthy of the name. *Cui bono*, this resort to the printing and filing of so many documents? The ammunition not unfrequently was all blank; it neither killed nor wounded. It was as if candidates for the Civil Service were examined separately by post. A skilful pleader will usually evade a conclusive admission, or extenuate by his art any statement that would otherwise operate injuriously to his client.

In almost all cases, prior to the hearing, neither litigant could be seriously damnified by the state of the pleadings and evidence. Lawyers, however, profited largely by the preliminary mock fight. Indeed, the solicitors were strongly tempted not to put the opposite parties at once *hors de combat*. The terrified mouse was adroitly and tenderly rocked to fro until his substance was reduced to a minimum. He then might get the *coup de grace*, although, if it were an administration suit, the practitioners would, as a rule, find it advantageous to get an order for the costs out of the assets and not personally against the real opponents, who might be men of straw. In joint-stock causes the ass were thus

to have applied the existing Common Law method in a more simplified form. Certainly Chancery pleading has been the *ne plus ultra* of legal vexation and delay, and has injuriously affected the profession as well as suitors. Some firms of solicitors may possibly have been considerate enough to deal leniently with their clients. Other practitioners, however, may have made their victims to pay for the numbers of causes that are settled out of court through fear of costs, just as tradesmen who sell on credit indemnify themselves for lost debts by compelling their solvent customers to pay proportionately high prices.

The new rules appear to present several loop-holes for evasion. The 18th paragraph of the 20th order provides that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." This order means well, but it is questionable whether its good intention is worth much. For, every statement of a fact is evidence of the primary demand made by the writ of summons. What, then, is there to prevent a plaintiff putting in his declaration a hundred different statements of facts? This permission will be hailed with delight by special pleaders. It affords room for the thin end of the wedge. They are sure to give no cause of complaint for excessive brevity. The slender platform allowed them will be extended until it is coincident with the ancient boundaries of their empire. Saint Bridget's shawl was small at first view, but, when spread out, it covered the whole Curragh of Kildare, as the Irish King of the period learned to his cost. He gave the Saint liberty to appropriate only the breadth of her shawl for a convent, but he did not define the major dimensions of the shawl itself. The pleaders will call their statements mere abstracts or *precis* of facts and not evidence. But they will be paid for their volubility as usual, and so the suitor will find himself overwhelmed by the old verbal Aberglaube. Our apprehensions may, perhaps, prove to be ill-founded. But we cannot

be sanguine of finding a threatened profession limiting their privileges in any way. However, it is certain that evidence of the facts cannot be introduced, and this shuts out to some extent the peculiar viciousness of the present Chancery system of pleading. Still, as a great number of facts may together go to constitute only a single claim, it is probable that the record may become more voluminous than it is at present *at law*. To be more verbal and prolix than it is in Equity is a feat which even the special pleaders of the last quarter of the 19th century will perhaps be unable to accomplish. The true remedy for verboseness is to limit every declaration to seventy-two words or thereabouts for each claim, but to allow of several claims being sued for in the same action as at present, and, consequently, to permit as many folios of seventy-two words each as there are distinct claims, but not as many as there are facts going to make up each claim.

The 15th paragraph of the 20th order complicates matters further by providing that each party must "allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings." If this is not allowing the filing of evidence which the 7th paragraph of the same order forbids, it is hard to understand the sense in which the framers of the rules have used their phraseology. The 20th paragraph furthermore, provides that matters of law shall be pleaded as such, and not be proveable under the general issue. These paragraphs, thus virtually perpetuate special pleading in all its present intensity in order to prevent "surprise." Pleadings, therefore, so far as defences are concerned, may not differ very much from the recent models.

Codification.—The prospects of codification are, however, worse than those of procedure. The Digest Commissioners, after holding a sort of competitive examination of candidates,

declared, in their second Report,* that it was "unadvisable to continue any further this mode of proceeding," and accordingly they relinquished their allotted task. The long vacation thus entered upon has not been since broken. The reason assigned for this dereliction of duty was that the specimens submitted "would have again to be revised" when the "time arrived for inserting them as portions of a complete and systematic work." This discovery does not indicate much originality on the part of the commissioners, nor any adequate excuse for their sudden halt. Why could they not have persevered in digesting various detached portions of the law, and so have accumulated materials for the final digest or code? Such a consummation, indeed, they intimate is more within the province of velleity than of realization. "The experiment" already made, it appears, "has served an useful purpose. It has brought out very clearly the difficulties to be contended with and the conditions under which the work must be executed"† The chief desideratum seems to be a staff "of the most highly skilled persons" who should "give to the undertaking the whole of their time and energy." This revising body, however, would find their labours much facilitated if the rough work of digesting particular subjects (as distinguished from a cross division of statutes and cases), had been first disposed of. There is no reason why the commission should not be rehabilitated and persevere in its primary course. Its recommendation to have a few persons, "three in number," permanently engaged at "high remuneration," is perhaps better still than a reconstruction of their own body. But, at all events, the digesting process should be carried on under a presidency of either kind, or under the statute law commissioners, their powers being enlarged for that purpose. The revising body should have a permanent discretion to employ as many or as few assistants as they pleased. The digesting process will

* 1870, *Parliamentary Papers*, Vol. XVIII, p. 231.

† *Parliamentary Papers*, 1870, vol. XVIII, p. 23.

require much time, and may undergo frequent alterations of method until the work is completed.

The Digest Commissioners have erred much in supposing that no progress could be attained by any route if at all devious ; they also acted at first with some slight indiscretion in advertising for specimens and actually digesting three important heads of law, namely, mortgages, bills of exchange, and easements, without having devoted more thought to the general plan on which the digest should be constructed. They neglected to strike a light before turning on the gas, and the result was a terrific explosion. The quarrel between them and their employés is, indeed, now an affair of the past, but it is suggestive of caution for the future. They should at all events bestir themselves. Burying the talent entrusted to them is still worse than its hurried investment. Their present inertness is quite at variance with the sanguine hopes they entertained at the outset of their career. At that time they considered their proposed task to be an easy one ; they even held that it was the duty of the State to codify its laws, in order to render the "greatest possible number of persons aware of their legal duties."* It is, indeed, the duty of the State to have its statute book comprehensive, clear, and homogeneous, in other words, to compile a code. But the little learning that a layman could glean from such a work would do him more harm than good, if he became his own conveyancer. As regards Criminal Law, it is already known to all so far as a knowledge of it could be generally diffused ; for it is but a small portion of the more comprehensive moral law which is carried in every one's bosom. If the commissioners could have simplified our Jurisprudence, so far as the practitioner is concerned, they might well be content with that degree of success. They overrated the uses of a code ; their feverish speculation accordingly has led to panic and the collapse of their scheme.

* First Report of Digest of Law Commission, 1867, *Parliamentary Papers*, vol. xix. p. 301.

The chief reason why England never before made any serious attempt at codification is suggested by her early history. The Normans brought with them the feudal system already matured, and bearing the ripe fruits of law and order. Norman precedents were applicable to new English cases, while the civil jurisprudence of Rome supplied any additional rules that might be required. The policy of Anglo-Norman jurists, consequently, was not to codify or contract, but to expand, develope, and add to existing customs. But, in countries where neither the Aborigines nor successful invaders possess any elaborate system for the regulation of proprietary rights, a wholesale borrowing from the jurisprudence of other States becomes necessary, or else there must be a rapidity of legislation equivalent to the formation of a code. Rome, in the time of the Decemvirs, was still a barbarous city, the inhabitants of which were hardly yet, perhaps, mutually assimilated in one homogeneous mass. Domestic precedents were probably few and not founded on an harmonious system of principles. An importation of laws from Greece was, therefore, a prime necessity of the national life. The period of the Decemvirs, in Rome, corresponds, in the order of national development, with the era of Solon, at Athens. He, too, was a codifier; the condition of the city of Cecrops required that there should be a written code for persons who knew not what laws or customs to obey. Alfred the Great was both a codifier and a constitution maker; but the island was too disturbed to permit of his devoting sufficient attention to the compilation of a complete code.

The Napoleonic codes were a necessity to a people who had abrogated almost all preceding laws and usages. A regard for precedent indicates a spirit the reverse of that of the codifier. In England, therefore, where precedent was always more or less observed in fact, and was always professedly so, there were no codifying tendencies, at least so far as wholesale legislation *de novo* was concerned. Abridgments or treatises were in vogue, but these were of a

juridical rather than of a legislative character. They were compiled by persons who enjoyed authority either by reason of office or of their general juristical status. Their function was to draw from the inexhaustible stores of feudal and civil law just so much as would serve for immediate use, and thus to cite precedents rather than to adopt the *role* of the reforming legislator. Their province was thus the very reverse of what would be the duty of a codifier at the present day. His great aim should be to diminish the bulk of the *corpus juris civilis*. But in a State where the jural frame is not yet weighed down by corpulence or senility, the chief object of a jurist ought to be to expand and develop the nascent ramifications of doctrine, and so to provide as many new precedents as possible. He would thus act the part of a decemvir or a Solon, and would strive to promote the repletion of the jural system, instead of reducing it. No doubt, a very large body of law would be just as inconvenient as too small a collection of jural rules and precedents, unless it was as easy for the practitioner to wade through the larger maze as the smaller one. We shall hereinafter proceed to show that a body of case law, especially if subjected to expurgation, can never become too voluminous, and that all attempts at codification should be founded on the principle of not adopting any rule that was not already elucidated by cases.

There are various popular definitions of a code. Some authorities, including the Digest Commissioners,* seem to consider that any jural consolidation confined to existing rules, without reform or change, is only a digest, but that a code is a homogeneous and consistent body of legal doctrine derived from first principles of jurisprudence, and not necessarily founded upon any extant system of municipal law. Others assert that a code should, in addition to its philosophic unity and completeness, be its own interpreter and admit of no reference to any other authority. Neither

* First Report of Digest Commission, 1867, Parliamentary Papers, Vol. xix., p. 66.

our own definition of a code nor our ideal of a consolidated body of law is in harmony with either of the foregoing views. A code in the modern sense of the word is a complete consolidation of Common Law and statutory doctrines, with or without reforms, and is equivalent to what an amalgamation of Justinian's Code and Pandects would be for the civil law. We shall, however, as a rule, use the terms code and digest as synonymous, since the digest contemplated by the late commission corresponds to our definition of a code.

Codification is essentially a mechanical process. The simple elements do not disappear in the compound ; if they do, this result is owing not to the consolidation of rules, but to the infusion of some fresh ingredient not previously known to the legal system. A code, however, is usually attended with reforms. "The making of a code," as the New York codifiers observe, "involves a general revision of the law."* A legislature that resolves to take the whole jural fabric to pieces, in order to cleanse and readjust every single part, will naturally consider that such an extensive system of repairs will be rendered the more effective by the introduction of some organic changes. In the converse case of a new system of law being resolved upon, it is, of course, propounded in the form of a code. That term, however, properly means nothing more than order or arrangement, or the ideal of a legal system, as regards the consecutiveness of its parts. But as a close observance of dramatic unities usually indicates creative power, so also beauty of arrangement, in the case of a dry subject, comprising numerous details, holds out fair promise that it also has substantial merits, and will minister to the useful as well as to the gratification of taste. A code, at all events, has the advantage of being suited to every system of law ; for, whether that is good, bad, or indifferent, it will be exhibited to best advantage in an orderly shape. "

The late Mr. Justice Willes, in his dissenting note to the Second Report of the Digest Commission, has confounded a

* The Civil Code of the State of New York, Preface, p. xxx.

code *pur et simple* with a reforming code. He would have termed the former a digest. But, waiving all disputes about words, his views are in one important respect essentially sound. "A Digest," he says, "gathers and compiles what has been decided or deemed, and, amongst other relics, it will preserve the conflicts of Common Law and Chancery, and the rest; whereas a code must needs once and for all lay down uniform rules of justice to govern every Court."* Reforms certainly should precede codification, so far as those amendments are concerned, which are already defined by cases.† We deprecate the introduction of any wholly new rules that are not as yet embodied in judicial decisions, and we so far dissent from the opinions of Sir James Willes. But there is no objection to importing a foreign rule of law, if such doctrine has been already defined or recognized by foreign tribunals, and if the cases upon it are referred to after the digested rule, according to the plan pursued in the New York code. Technical litigation, when it arises under a well-drawn instrument, is usually owing to a recent statute; in other words, to a partial attempt to accomplish what a code, such as Mr. Justice Willes proposed, would effect by wholesale, namely, the providing beforehand by abstract rules for all probable legal difficulties. The cases thought to be foreseen by such a codifier might never arise,‡ while other questions wholly neglected by him would be sure to give trouble.

Codification, however, is opposed by many experienced jurists on various other grounds. Some think that it would import uncertainty into those rules that are already clearly defined, whilst others imagine, that, though more certain, it would be less flexible and less capable of being adapted

* Second Report of Digest Commission, 1870, P.P. vol. xvii., p. 234.

† See section entitled "Equation of Jural rights," *infra*.

‡ Austin's views on codification, as opposed to case law, are calculated to excite much prejudice against any such scheme. A code, such as he and Sir James Willes really contemplated, is of too abstract a character to be worth compiling.

to new emergencies than the present vagrant system of devising a rule for each new case *pro re nata*. The most conservative class of jurists have doubtless a horror of recasting laws on so large a scale, lest the process might ultimately lead to changes even of substance and not merely of form. The most important objection, however, that is brought against codification is, that it aims either at the extinction of case law, or else at its re-production in a manner that would deprive it of its present matured completeness and efficiency. These objections seem, on first consideration, to deserve serious attention. But they are, in reality, mere fallacies of the form *ignoratio clenchi*, inasmuch as codification, *pur et simple*, could have none of the apprehended results. The other leading arguments against a code are all of them admirably stated and refuted in the preface to the New York Civil Code. Mr. David Dudley Field, the Tribonian of the American triumvirate, who prepared that work, attended some meetings of the Digest Commissioners, and we think that traces of his culture can be perceived in their definition of a digest (albeit they confound it with a code), as also in the admirable views on codification expounded in their first report.

Nothing certainly can be more complete or perfect in the way of codification than the ideal contemplated by the Commissioners.

"For a digest," they state in their first report, ("in the sense in which we understand the term to be used in your Majesty's Commission, and in which we use it in this report), would be a condensed summary of the law as it exists, arranged in systematic order, under appropriate titles and sub-divisions, and divided into distinct articles or propositions, which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied."*

* 1867, p. 6, Parliamentary Papers. Vol. xix., p. 71.

Statute and Digest Commissions.—A separate digest of statutes and other authorities—such as was compiled under Justinian—would be a mere compression of parts and not that homogeneous consolidation which is meant by a code. All such disjointed compilations are sure to abound with repetitions and contradictions—the “antinomies” of the civil law—and to elude all attempts to compile them on a single harmonious system of principles. The Statute Consolidation Commissioners experienced these difficulties. “In laying down rules for the consolidation,” they “felt it impossible to adopt one universal principle.” Accordingly, they treated “the different classes of statutes according to particular circumstances.”* Where a statute was overlaid by a judge-made rule the Commissioners reprinted the whole Act, though it was virtually repealed. Where a class of statutes consisted of a series of fragments, as, for instance, the enactments relating to landlord and tenant, it appeared “at least doubtful,” the Commissioners say, “whether in cases of this kind anything like a complete and intelligible enactment can be produced unless we re-write the law, availing ourselves occasionally of our power to embody the common law.”† Now, all our statutes severally are but fragments of a greater whole. The passage just quoted, therefore, is almost as strictly applicable to every class of enactments and cases.

The only Acts which the Statute Commissioners approved of consolidating either related to mercantile contracts or else were wholly new to our jurisprudence. However, they did not hide the single talent entrusted to them, but sedulously cultivated their scanty inheritance, just as if it contained a great jural treasure, while their Digest brethren, bewildered, as it were, with the vast prospect before them, halted on the frontier of the promised territory, and proclaimed that the supposed land of milk and honey abounded with giants and noxious animals of every kind. The Statute

* 3rd Rep. p. 7, *Parliamentary Papers*, 1857, vol. xxi., p. 270.

† *Ib.*

Commissioners deserve public gratitude for the precedent they have set. They boldly penetrated into the interior of the *terra incognita*, and though they could not, under the terms of their limited commission, storm the enemy's citadel, yet they surveyed much territory, and justly "claim the credit of having actually commenced and even made an important progress in a work which others have only recommended."*

They were given a discretion by the terms of their commission to incorporate with the consolidated statutes such "parts of the common or unwritten law" as should seem desirable. The mandate was equivalent to a direction to form a digest. But it was disregarded so far as the Common Law was concerned, and the statutes have been consolidated quite irrespectively of the rules of the Common Law.

Now it would be the merest waste of labour, as well as a cross division, as we have already stated, to compile another digest of cases before fusing both. The amalgamation can, with equal convenience, be at once effected without forging another intermediate link for a temporary purpose. Indeed, it is impossible to consolidate statutes and cases separately, without undergoing the trouble necessary to amalgamate both. Otherwise the digester cannot be conscious of "the extent to which his proposed measure will affect other branches of the law; or is not aware of the exact state of the law with which he proposes to deal."† No doubt a digest of cases would be of some convenience, but this value either in use or in exchange for an ulterior digest would bear but a slight proportion to its cost of production. Indeed, a digest of cases, unless the statutes were as much as possible unnoticed, would be virtually a code, for cases at the present day comprise almost every legal doctrine. Still, a code *per saltum* is what alone will satisfy the public expectation. There is no reason for compiling numerous preliminary

* Third Report, 1837, p. 8. Parliamentary Papers, 1837, Vol. xxi., p. 211.

† Second Report of Statute Law Commissioners, 1850. Parliamentary Papers, vol. xviii., p. 861.

digests. No doubt, any expurgatory processes previously resorted to will be available for the ultimate codification; and, if cases and statutes were previously digested, the code could then be constructed, like Solomon's temple, without sound of pick or hammer. But owing to the fact that cases and statutes overlap each other, it is quite unnecessary to revise either branch separately, and least of all the statutes, prior to the formation of a code or plenary digest.

The Statute Revision Commissioners, therefore, though deserving commendation for their spirit and enterprise, have been engaged in a comparatively useless undertaking. Its expensiveness, too, is worth noting. The revision commissions cost £80,619 between the years 1833 and 1869; how much expense has been added since, or will be incurred in future, it is unnecessary to inquire. And yet the work done is almost useless, except in its negative or expurgatory aspect; it is even apt to mislead, as it does not notice instances of implied repeal. The idea of consolidating the statutes alone was a foolish one. But as the unwise bird in the fable could lay golden eggs, so, doubtless, the wild-goose plan of consolidating statutes without cases has afforded profit and pleasure to those engaged in the pursuit. However, until a more extensive consolidation, such as was contemplated by the Digest Commission, is entered upon, the consolidated statutes must be regarded as a mere *ex parte*, fragmentary, and unveracious account of the law. It is as if the War Office directed that all large and small arms now in use by the military should be re-cast with altered bores, but that the ammunition should continue as before, or as if a surgeon cut and hacked away without regard to the constitution and feeble vitality of his patient. The statutes are the mere skeleton of the living jural subject; nay more, they have no legal existence whatever apart from their judicial construction. Accordingly they may be supposed to resemble the mathematical lines and angles that underlie the flowing outline and gorgeous tints of a portrait, rather than the osseous system of the human frame.

The work done by the Commission, however, though valueless if left to itself, will be of much use in respect to a future general consolidation. For a partial digest, such as the consolidated statutes are, is not an inchoate code, but an expurgated part thereof. The Commissioners have cleared away much rubbish, although the fabric they are constructing can never be fit for purposes of comfort and convenience. This object, indeed, might be to a large extent realized if the consolidated statutes were re-published, with notes referring to implicit repeals as well as to leading cases affecting the construction of the text. The "register" devised by the Commissioners denotes only instances of express repeal.* But there is, of course, an equal necessity for showing how much of the text has been implicitly repealed, either by the legislature or the judges.

The Commissioners proposed to have 173 headings or distinct enactments in their finished work. They afterwards enlarged this estimate to 400. Indeed, they were not very confident "that the whole existing statute law might be usefully consolidated in from 300 to 400 statutes." The number of chapters and sub-divisions, however, is not important, provided the whole bulk be kept within reasonable compass and the contents be consistent, homogeneous, and accompanied with a good index. The issue of a code would be followed by the publication of several miniature editions by private authors. However, *ceteris paribus*, the smaller any digest or code is, the more convenient will it be for professional or private use. If it consisted of one hundred volumes, as the late Digest commission contemplated, then, indeed, the cure, besides its expense, would be quite as troublesome as the original malady.

The Statute Commissioners once considered that four volumes would suffice to contain all the operative enactments since the union with Ireland.† As regards the pre-

* *Vide* Fourth Report of the Statute Consolidated Commissioners, 1859, p. 4; Parliamentary Papers, 1859, Vol. xiii., part 1.

† Fourth Report, 1859, p. 4. Parliamentary Papers, vol. xiii. Part I. p. 4.

union statutes, the same high authority has stated that very few of those enactments have any efficacy at present. Few of the pre-Revolution Acts, it appears, are of any importance whatever. The Commissioners consider that "If the register is carried back to the Revolution of 1688, or perhaps even to the accession of the House of Hanover, it may probably answer most of its practical purposes."* Nevertheless, ten more volumes of consolidated statutes are expected to be issued. It is to be hoped that the brood will not be quite so numerous, or rather that the commission will be reconstructed for the more general purposes of a plenary digest. Very few—probably not two per cent.—of the early enactments require to be consolidated. Furthermore, as a single statement of a rule would suffice, a digest of a statute, (not since implicitly repealed by another Act or a judge-made rule) would not require any digest of cases. The size of a code or complete digest, therefore, would not be made up of the minimum bulk necessary for digested cases and statutes severally; since, as far as these overlap each other, one of the common parts could be amputated and the duplicate alone be re-expressed in the digest. The matter to be thus consolidated should in all possible cases be taken from the reports. The Statute Consolidation Commissioners are surveying only the less luminous hemisphere. They have also begun at the wrong end. It is the latest statute on any subject that should be first consolidated. The opposite course leads to the revision of statutes that are afterwards found to be repealed.

The Digest Commissioners state, in their first report, that a digest would "bring the mass of the law within a moderate compass, and would give order and method to the constituent parts." The latter object alone, however, could be attained by a compilation on the plan proposed by them. Their digest would be only a miniature of a larger living subject, and, in all actual dealings with Themis, it would be sometimes necessary to consult the original reports. But, even the

* Fourth Report, 1859, p. 6, Parliamentary Paper, 1859, vol. xiii. Part. 1. p. 6.

digest alone, would fill, according to their own estimate, about a hundred volumes.

Such an unwieldy compilation, it need hardly be added, would, in no essential respect, fulfil the uses of a code. However, any method of consolidation would fail to confine the researches of the practitioner to a few books, unless their authority is exclusive, and their contents are expressed in so abstract a form as to be valueless for practical purposes. The giant, in the Arabian Nights, could not be repacked in the bottle, until he was reduced to his originally nebulous condition. Now, it is not mere vapour, such as is contained in Justinian's Institutes, that is required, but the fertilizing dew of nature, that will lessen the heats and storms of the day, and produce fruit in due season. What is wanted is such an authoritative exposition of the whole law as will lighten the burdens both of the practitioner and the legislator.

How, then, can the apparently antagonistic aims of a code be reconciled? How is the body of the law to be reduced in size without interfering with its integrity? The answer to this question is furnished by the New York Civil Code. Cases are there referred to at foot of almost every proposition. Each paragraph is thus constituted the nucleus of a vast coma extending into distant regions of jural lore. If the Commissioners, following out their own definition of a Digest, pursued a similar plan, five or six volumes would be found sufficient for the realization of all their designs. By carrying out, prior to compiling the code, or simultaneously therewith, certain reforms which would be opposed by no one, and which we now proceed to unfold, the size of the code or digest would be further much diminished.

The equation of jural rights.—If extensive legal reforms are contemplated in any state, it should postpone codification or consolidation of any kind until the proposed changes are carried into effect. If a reform, however, merely concerns procedure, it is, as we have shown, wholly independent of the question of consolidation, and may either

precede or follow it indifferently. But, if not merely the expression or form, but the very substance, of the law is to be subjected to innovation, a code compiled prior to the reform will be repealed *pro tanto* by its adoption. A code is the varnishing and external decoration of the legal fabric, and will, consequently, be neutralised, so far as the building is afterwards taken asunder. The consolidation of past law will be useful, of course, for a generation to come, inasmuch as the old rules will apply to all rights arising under gifts, contracts, inheritances, or wills, that take effect prior to the reform. Still, as codification is a troublesome and costly process, it is better to reserve it until all legal innovations, going beyond mere procedure, are completed. Then the whole structure may be appropriately glazed, painted, and fitted up with all modern appliances for comfort and use.

Codification, however, affords a convenient opportunity for introducing formal amendments. The Commissioners for Consolidating the Statutes were struck with this idea in the progress of their labours :—

“We would,” they say, “therefore, propose that the introduction of these Bills and of all other Consolidated Bills should be made an opportunity for effecting some improvements in the law at the same time; not improvements which are the subject of any differences of opinion or would raise any discussion, but merely remedying such defects as may be said to be accidental, and not owing to any deliberate intention on the part of the legislature—such as the removal of unnecessary variations between statutes relating to offences of the same nature now existing in consequence of such enactments having been passed at different times, or framed by different persons, the supplying of admitted deficiencies, and the correction of admitted inconveniences.”*

What the Commissioners here ascribe to a consolidation of statutes concerning offences is equally applicable to rules relating to civil rights. The differences between real and personal property, between Common Law and Equity, are entirely owing to accident, and not to any essential and immutable distinctions between these various classes of

* Third Report, 1857, p. 5, Parliamentary Papers, 1857, vol. xxi., p. 308.

rights. Wherever a single rule could be established in place of two or more it would proportionately abridge future litigation. Sometimes there are three distinct doctrines applicable to the same identical right. If in such cases out of the Chancery, Admiralty, and Common Law rules one is selected and extended to the other tribunals, as has been done by the 25th section of the High Court of Justice Act, all the cases decided in the latter courts on the point in question become obsolete in respect of future transactions. Two-thirds or perhaps more of the litigation that used to be thus occasioned by the conflict of laws is precluded for the time to come. The reports will, therefore, cease to grow at their past rate of increase, and yet no new rule has been introduced that can lead to doubts such as are occasioned by every novel enactment.

What is needed is not the introduction of any new legal doctrine, but the elimination of some of the present excrescencies. A rule excogitated from the inner consciousness of a great moral and social reformer, or imported from France or the United States, might lead to much litigation before its net practical effect could be ascertained. But the extension of an old rule to new cases begets no kind of uncertainty. This method of legal reform may be termed the equation of jural rights.

In working out this equation a great variety of amalgamations could be made. It would be hard, indeed, to consolidate certain classes of acts, such, for instance, as the Highway Acts for England, Ireland, and Scotland, as they now stand; for some of the provisions would then be contradictory of others. But *cui bono* the laying down a certain rule for one part of the United Kingdom, and a different rule for another part? No diversity of circumstances can ever affect the jural merits of a doctrine of civil law; if it is suited to one country, it is equally so to another. The moral law is the same in the breasts of all men; the jural code ought also to be the same; or at least it ought to vary only within very limited boundaries, and the diversities ought to relate merely

to restrictive discipline and penalties, but not to civil rights.

Our existing jurisprudence is only too copious. It contains not merely one rule, but many for certain cases. In a multitude of laws there is no guarantee that the least desirable of the batch may not be the one selected. Unnecessary distinctions, too, are certain to involve expense in order to ascertain which of the competing analogies should govern the point in question. The merits of different rules necessarily vary. The best, then, should be selected; nay even the worst, if it stood alone, seems better than a bundle of doctrines attracting the practitioner in different ways. The legislature should rescind all, or at least most, of the Common Law rules that vary from those of Equity, not only when they come into collision; as is provided in the Judicature Act, 1873, but in all cases. Possibly some few doctrines of the Common Law are preferable to those of Chancery. If so, the former should be substituted for the latter; one series alone is desirable. Therefore, before the work of digesting is resumed, an inventory should be prepared of all the existing conflicts of our laws. This list should specify the source of the diversity, as, for instance, whether it was occasioned by the past dualism of our Superior Courts, or by the different characteristics or incidents, to use a technical word, of the property in question. A choice should then be made of some one of the diverse rules. No wholly new doctrine should be recognized; for that would be to leave its effect uncertain until it should become the subject of judicial decision. But when a code merely extends the scope of a doctrine that already flourishes beneath a chaplet of authorities, the reform cannot possibly occasion any fresh uncertainty.

After assimilating the rules of all courts to the best extant models, the next step should be to amalgamate those rules that vary according to their subject matter. For instance, realty and personalty differ in their legal qualities not only in different courts, but in the very same tribunal. In the case of *Forth v. Chapman*, the words, "leaving no

issue," received two different interpretations in respect to realty and personalty. The court showed much philosophy in this construction. The testator meant to settle all his property, both real and personal, in the same way. In order to effectuate this intention, as regarded ultimate remainders, the tribunal was obliged to hold that the clause, "leaving no issue," meant one period of time in respect to the testator's realty, and another period in respect to his personalty. Now, all such devices for steering safely through the tortuous mazes of the law can be rendered unnecessary by an inversion of the stylus. All that the legislature has to do in order to straighten the crooked paths referred to is simply to delete one of the "contrarient" rules. The preferable one may be that at present governing realty, and in the case of *Forth v. Chapman* much can be said in favour of the feudal doctrine, notwithstanding its reversal by the Wills Act, 1 Vict. c. 26. The rules relating to personal property, however, appear on the whole to be more philanthropic, as they are certainly the more popular.

Besides selecting one only out of several kindred rules, the codifiers might also be entrusted with the duty of specifying any anomalies that might occur to them in the progress of their labours. "Thus," as the Digest Commissioners observe, "the process of constructing the Digest would be conducive to valuable amendments of the law."* This suggestion, as well as the ideal of a code or digest proposed by the Commissioners, appears to be suggested by the New York Code, which comprises various reforms, some of which, however, are wholly new both to English and American jurisprudence.

International Rules.—Owing to the numerous blanks that exist in international law, it presents an excellent subject for a code of any kind.

The Social Science Association convened an International Congress, in 1862, for the purpose of settling a common code

* First Report, 1867, p. 6; Parliamentary Papers, 1870, p. 71.
Preface to New York Civil Code, xxx.

of general average. Deputies attended from almost every nation under heaven, to consider a bill drawn by us at the request of the Association. There can be no difficulty in the way of devising rules respecting freight, danger signals, the maritime road, and other obscure doctrines of private international law. The rules at present relating to sales of contraband and to the rights of neutrals generally, also seem fit subjects for being determined one way or the other. A time of peace is the most suitable for international agreements of this kind. The first Alabama Commission, as it was called, failed to lay down lines for further friendly communications between England and the United States, as the American waters were then seething from the recent civil tempest. Fortunately, the lapse of a few years sufficed to calm the national ill-will sufficiently to lead to a peaceable solution of the difficulty. The Paris Manifesto of 1856 was also adopted after the thunder of war had rolled away. The horizon both East and West just now is free from clouds of any magnitude. The present time, therefore, is eminently favourable to the settlement of an international code of maritime rules.

An international rule, once settled without resort to force, will never afterwards be set at nought by any leading power.

Disputes about facts, indeed, will arise from time to time. There will be wars and rumours of war until the end. Proposals for disarmament and arbitration, therefore, appear to be somewhat Utopian. Indeed the treaty of Paris, 1856, provided for references to arbitration. Yet since 1859 more blood has been shed than during any previous period of equal length known to authentic history. But let the hemisphere of law be illumined^a and its boundaries clearly traced, even though that of fact and of the future is necessarily left in darkness, and many causes of dispute will be precluded. The objection to municipal codification—that it submerges case-law—cannot be advanced at all, much less established, as regards international law. For there are in that department of jurisprudence few or no cases of universal authority

among military, as well as naval, powers. Indeed, the latter are suspected of having devised rules that favour nations possessing much naval strength. There is, consequently, an absolute necessity for positive compact respecting many even of the least doubtful international rules. Mr. Field's code* appears to be a comprehensive summary and to afford a good basis for discussion. It is really immaterial, except as regards insurance rates, how several of these points are determined, provided they are definitely settled one way or the other.

Hitherto our foreign secretaries have found themselves involved in a legal discussion every time a fresh war broke out. Yet there can be no great obstacle in the way of settling a comprehensive code of public or, at all events, of private international law. The American Jurists may be claiming too much in the interests of peace; but there is a large substratum of sense in their propositions. Though all nations are not prepared to turn their swords into ploughshares, yet they are certainly anxious to know what sales to belligerents are unlawful, as well as what danger signals are to be used in time of peace. The disastrous fate of the *Northfleet* shows that in Great Britain there is no definite code of danger signals even for British ships. It is obvious that international doctrines are still more obscure.

Importance of Case Law.—The Digest Commissioners, in their first report,† divided law into four branches: namely, civil law, criminal and constitutional law, and procedure. Criminal and constitutional rules, however, are essentially akin in their political bearings, and may be classed together. It is with the civil or municipal jurisprudence that codification is mainly concerned. Criminal rules are too few and clear to give any trouble to the interpreter. However, doubtless, a code of criminal and constitutional laws would be ultimately compiled, if once the civil department had been subjected to the ordeal of consolidation. As already

* 1872, New York, Baker, Voorhis & Co.

† 1867 61; Parliamentary Papers, 1867, vol. xix., p. 65.

shown, procedure has no relations to substantive law, and will have been sufficiently provided for by the Judicature Act of 1873, if the new rules now framed under the statute preclude their evasion by the pleader.

The Commissioners add that each of the four branches of the law enumerated by them is composed of three different kinds of ingredients, namely, the common law, statutes, and judicial decisions and dicta. This threefold division is also reducible to two heads, namely, decisions and statutes. For the Common Law has no existence except in the reports. Mere extrajudicial dicta, too, may be disregarded in this classification; they are often deceptive, and never have conclusive authority. Even statutes will afford but slender and comparatively unimportant materials for a code. Indeed, it is only a very recent enactment that will not have found its reflex in a decision which, and not the letter of the Act, then becomes law. Cases, therefore, virtually comprise all our jurisprudence.

The reports, indeed, were once described by the late Lord Westbury as constituting "what can hardly be described, but may be denominated a great chaos of judicial legislation."* Chaos, no doubt, prevails before a new difficult point has judicial light thrown upon it; chaos, accordingly, is to be found throughout the period of our Jural Genesis, especially as regards the doctrines of equity. But it is quite an exaggeration to allege that many of the questions adjudicated upon in the reports are still *sub judice*. It would be equally unwarranted to hope that mere codification could clear up a conflict of authorities. The last case is, of course, the guide for the future; and, if that decision was pronounced by the ultimate appellate tribunal, there is no ground for any further doubt on the point so disposed of. The elements of our jurisprudence would have been correctly classified by the Commissioners, if by judicial decisions they meant what is known as judge-made law; viz., that

* Speech on the Revision of the Law, House of Lords, 18th June, 1868, p. 8. London: Stevens & Norton.

portion of case-law which was originally contrary to some rule of statutory or common law, but which has acquired prescriptive validity. Its sanction is the presumed acquiescence of the legislature. The rule that there cannot be a use upon a use is considered to be contrary to the intent of the statute of uses. This doctrine, therefore, may be regarded as judge-made. All equity is confessedly of that character, so that we need not go further to show that the judge-made ingredients of our law constitute some of its most vital parts, and that any scheme of codification or digesting, that threatens to interfere with the integrity of our reports, is not a system of consolidation, but a gigantic project of law reform, the effect of which may not be sufficiently criticised while it bears the mild name of a Digest.

Any division, however arbitrary, of the elements of jurisprudence will be in practice unimportant, if the actual value of cases be duly appreciated. The Digest Commissioners* appear to have regarded statutory, common, and judge-made rules as co-ordinate in authority and effect. This view of the sources of jurisprudence involves a serious misconception of the relations of case-law to the general legal system. In case-law all the simple elements are blended together as in a common reservoir containing as it were a well-spring within itself, and also receiving from without various streams that cannot be utilized until they have been received within its capacious bosom. It is only in the authorized tribunal that any law whatever has an exponent, and if ever again either branch of the High Court of Parliament comes into collision with a court of law, as happened in the cases of *Ashby v. White* and *Stockdale v. Hansard*, the only remedy will lie in a fresh statute so plainly expressed as that no judge would venture to contravene its provisions as interpreted by a layman of ordinary common sense. But, unless the three estates of the realm usurp judicial and even executive functions, it is clear that statutes and proclamations must undergo

* First Report, p. 1.

revision by the judges. It is the judicial impress alone that can declare the net value of the legislative issues. The language of a statute, indeed, may be too plain, to admit of doubt; the pure gold may need no mint stamp. But let us suppose that the judges declared the metal to be spurious. In that case it is clear that a counter decision should be procured by some means or other before the coin in dispute could become legal tender.

It need hardly be observed that a precedent cannot be impugned upon the ground of its being contrary to reason, morality, or revelation. Blackstone's opinion* to the contrary is obsolete at the present day. Even if the decision in question is founded on a judge-made rule, which at the time of its first promulgation was really contrary to all philosophic analogies, yet to ignore the rule now would be to increase judicial discretion, instead of abridging it. The objections, in short, to judge-made rules apply to creating them, but not to their subsequent application. As to the portions of case-law that faithfully reflect statutory or common law rules, no writer has ever yet ventured to impugn their value. Common, Statutory, and judge-made rules, then, are laws only in the sense in which they are at present recognized by the courts. A technical statute usually creates much litigation until every word of the Act has been repeatedly spelled and defined by the judges. Unforeseen difficulties, also, frequently arise, even under Acts of Parliament apparently couched in the plainest language. Those jurists, therefore, who prefer codes, or consolidated statutes to cases, forget that a statute cannot execute itself or declare its own meaning; it can serve a use only through the judicial conduit-pipe. Cases, in short, are not only laws, but they constitute the sole final expression of the legislative will; and even a judge-made rule, although it may have been originally unwarranted, is much more certain and definite than any statute not judicially expounded.

* Comm., vol. I., p. 69.

Hence arises the peculiar value of case-law. It alone is certain. It follows that the utility of reports is in direct proportion to their voluminousness. Let us suppose that half of our stock of authorities was burned accidentally or intentionally, as certain law reformers have at times appeared to contemplate. The British Caliphs would have rendered the law more Sybilline, oracular, and costly than ever. The Common Law was more uncertain three hundred years ago than it is now. And yet in Sir Edward Coke's time, "Ye mysterie of ye laye" could only be learned, it was (hastily, indeed,) said, by not less than twenty years' study. If, then, *viginti annorum lucubrationes* were necessary to master the whole body of British jurisprudence in the time of James the First, and if the difficulties of legal study increase with the accumulation of reports, old Parr would have found his life too short for a course of legal reading. The fact is that many, even of the leading cases, are mere deducibles from others. They are legal facts, as it were, put on record, or so much evidence turned into pleading of a general nature, and intended to serve as common forms for the future. Their accretion, however, to our legal treasury, instead of being an incubus, adds to its value. They constitute a fresh accession of oxygen, as it were, to the legal atmosphere, or they may be regarded as so many additions to the suitor's wardrobe, which may be used successively as occasion requires. In international law, for instance, as already observed, the difficulties of investigation spring, not from the abundance of treaties or decisions in prize courts, but from the want of these faithful witnesses of public law.

The embarrassment occasioned by our legal riches, then, ought not to be regarded with much sympathy. The alternative is either want of law or judicial discretion, which, until fettered by a course of fresh precedents, is really the negation of law. Our reports, therefore, ought not to be interfered with by any scheme of legal consolidation, except to the extent indicated by the New York Civil Code. That

compilation does not disturb existing case-law, except where it introduces a reform. Obsolete and contradictory decisions, indeed, might be safely expunged in express terms. Yet even now obsolete cases cannot be quoted with any chance of success, and, as regards contradictory decisions, we doubt exceedingly whether there are very many points at present on which the balance of power is not distinctly indicated on one side only. Nor has the advocate to reckon or weigh the hosts on either side. The last case or treatise on the point will present him with all the *materiel* he requires for a bombardment in court.

Difficulties in the law occur at the present day chiefly in consequence of new statutes or a judicial mania sometimes setting in contrary to the previous current. Such fatuity, indeed, is rare. An instance occurred, however, within the last twenty-five years with respect to the equitable rule for computing survivorship in cases where a testator settles property on one for life, with remainder to a class. The Common Law, being a portion of moral doctrine, is necessarily deductive, and partakes of the nature of a strict science. But, in the course of time, owing to a regard for precedent, many technical rules spring up, and these, becoming incorporated with the old jurisprudence, thereby give rise to a hybrid series of rules, which, however, are again propagated after their own kind. It would hold out a bounty on litigation if the ultimate appellate court reserved to itself the privilege of over-ruling any number of authorities, even where these originally grew out of a technical and improper graft upon the stock of the common law. Its maxim, *communis error facit jus*, is, on the whole, a salutary one, and therefore *stare decisis* (to quote another maxim), must be the motto of every court, primary or appellate.

Another reason why decisions must be adhered to is that even if law should be regarded as a strict science, and, consequently, as capable of being developed and applied in every new state of facts, yet, all know that even mathematics, although the model of strict deduction, nevertheless

require much careful study. A book of precedents, therefore, as well as a book of forms, would be useful, even though every legal question was viewed as a strictly ethical and not as a technical problem. The general uses of reports, then, overbalance the evil resulting from their technical elements ; and the adherence to precedent, which a system of reports implies, operates more beneficially than if the ultimate court adjudicated upon abstract principles, no matter how highly philosophic these might be.

Law is the growth of time and not of study ; neither can it be always bespoke or made to order, although its chief elements are of a scientific or *a priori* nature. For even mathematics grow ; at least the more difficult practical problems, while capable of being conceived and solved *a priori*, yet in fact, at the present day, rarely are so. Precedent or experiment even in the strict sciences, therefore, is of use, as it abridges investigation ; and though legal precedent stands on the mere *ita lex scripta est* of a positive precept, yet it rarely does open violence to the moral system of the Common Law on which it is engrafted.

The difficulties which the Common Law originally had to contend against consisted in setting up a standard for discriminating duties of perfect from those of imperfect obligation. Both classes of duties belonged to moral science and were capable of definition and demonstrative deduction. Locke's assertion that morality admits of demonstration is only a scientific expression or paraphrase for our moral nature. But how, prior to precedent, to mark off merely moral from legal duties was a difficulty which the moral character of both classes of data in no way helped to remove or alleviate. Precedent or statute alone could determine when a man used his own property to the detriment of his neighbour, without giving the latter a cause of action, or when the primary cause of action, when it did exist, was nevertheless too remote. Even in cases such as these, perhaps strict casuistry would lead us to the opinions adopted by the judges who first laid down the existing legal rules on the points

referred to. But, still, where the practical links in the chain of reasoning are so many and complicated, it is satisfactory not to be obliged in every case to recur to moral or constitutional principles, but simply to point to the *ita lex scripta est* of the last decision.

That oracle is always most easily ascertained. The latest text-book on the subject will give it ; and Vesey, II junr., p. 10, can be almost as easily reached in a library of ten thousand volumes, even were they all reports, as in a book-case comprising only the compilations of the two Vesey's. No one finds any difficulty in searching Johnson's dictionary. Orthography would not be promoted by ostracising Johnson, or condensing his work into a small handy-book, the words in which were to be arranged, on a logical, and not an alphabetical, principle. What matters it whether the reports are issued according to the months in the year, the days in the week, or their subject matter ? An index must be consulted in any case, and the principle on which the legal repertory is compiled is thus comparatively unimportant. Legal subjects, moreover, are called by various names ; so that the alphabetical crutch cannot be flung away. Every consideration, therefore, points to the conclusion that the existing reports of British law are most useful, and that any *rechauffe* of our jurisprudence, which contemplates the cancellation of decisions not already overruled, would render the law more uncertain than it is now. Such a course would transfer to future judicial discretion what it took from the past labours of the courts, and would merely give us an uncertain future rule for present certain law.

Duties of perfect obligation are at first discriminated from the general body of moral law only by analogy to the political constitution. Accordingly, after a revolution, previous legal decisions lose much of their venerable nature ; since the real, though unseen, foundations on which they rested are taken away. A code, therefore, constructed independently of a digest, will suit a new or revolutionized State much better than an old country. Indeed, a digest

alone for an old State must really be both a code and digest. There is no statute at the present day (excepting the legislation of the last few years), that has not borne a copious crop of judicial decisions. A digest of these, therefore, must, in order to be intelligible, comprise the statutory law on which they are founded.

Justinian's Pandects were filled with the *responsa prudentum*, to which our law has nothing strictly analogous. The writings of Butler, Hargreave, Preston, Blackstone, or Kent, are not to be named, in point of authority, with *Duncomb v. Wingfield*, or *Dillon v. Freyne*. The Roman emperors, moreover, in their legislative capacity, issued constitutions irrespectively of the *responsa*; so that a consolidation of each of these descriptions of independent legislation naturally developed much in each body of law that was antagonistic to parts of the other. The *antinomies*, or contradictions of the Code and Pandects, however, cannot find a reflex in any consolidation of English law which will steer clear of obsolete decisions and repealed enactments. Indeed, a digest properly framed, would render unnecessary any consolidation of the statutes; or, rather, the proper mode of consolidating the law is to prepare a code on the plan we have described. Statutory, common, and judge-made rules extracted from the reports would be the main text of such a Consolidation Act, while the cases in their present form would serve as a commentary thereon. The following method of incorporating the cases, however, should be strictly observed.

As they cannot be bodily transcribed into a code without rendering it as cumbrous as the reports now are, and as they cannot be ignored by the codifier, the obvious alternative is merely to cite them. This is the method adopted by the New York codifiers. A general principle is first stated in the text, and the cases are added in support of the proposition. The whole consolidation is thus essentially an authoritative treatise on law. It is only the proposition in the text that is indisputable. The atmosphere of cases is

supposed to yield no light except what is reflected from the text ; so that any unsoundness or verbiage in the cases not cured by the text retains its previous defects. If the cases constituted part of the organism of the code, instead of its clothing, their flexibility would be lost. Every proposition in them would then be law. This would really change existing jurisprudence very much ; since cases are only law in a certain sense ; nor does the marginal note of the reporter always convey that meaning correctly. The New York Code is, as it were, an authoritative enunciation of the marginal notes of cases and statutes. So far the consolidation is a code *pur et simple*. But its merit is that it has a lateral support from cases, without imparting to them or to their dicta or verblage any greater authority than they at present possess. The compilation is thus a code and a treatise. So far as it is a code, the propositions are co-ordinate in authority ; so far as it is a treatise or digest of cases, it is of no authority, except through the medium of the text. It is desirable that the interpretation clause of this code, which is entitled "General Definitions and Divisions," should be expanded so as to contain a provision similar to what is comprised in the Indian Penal Code, to the effect that "the illustrations make nothing law* which would not be law without them." A similar caution should, doubtless, be contained in the preliminary chapter, or interpretation clause, of an English Digest or Code. The New York Code, on the other hand, does not abrogate any existing doctrine, except so far as such repeal may be expressly or implicitly effected by the text. A like course should be pursued by our codifiers.

The New York compilation has been so often referred to in this article that it is necessary to add, in order to preclude a presumption that might otherwise be entertained, that we refer only to its plan. As regards principles of codification it cannot be surpassed, and, in fact, as already stated, the ideal of a digest, propounded by our own Commissioners, was evidently suggested by the American work.

* *Vide* Edinburgh Review, Vol. CXXVI. p. 365.

Its contents and reforms, of course, are distinct from its codifying merits.

A code, then, should not involve the Sibylline or Caliphite policy of burning our books. These, if rendered useless, will soon disappear. Neither should a code enlarge the margin for judicial discretion. If a certain rule is expedient, but contrary to the decisions, then let the legislature be appealed to. It is, indeed, exceedingly desirable that copious law reforms should be introduced into the English system; and every body of law, however originally perfect, or made so by a reforming code, will, in the course of time, require pruning. But, until the legislature intervene, the guiding motto of the judge should be *stare decisis*.

Authority and uses of a code.—The difficulties of the legal profession are greatly exaggerated. "Look at my library," the lawyer is supposed to say to his client, "I must understand all these books, and a great deal more." The Lord Chief Justice himself says, "We seem to be making no progress whatever towards reducing to any intelligible shape the chaotic mass—common law, equity, crown law, statute law, countless reports, countless statutes, interminable treatises—in which the law of England is by those who know where to look for it, and not always by those to be found." A layman's interpretation of the foregoing would be that Sir Alexander Cockburn had read all these treatises and cases, and is now anxious to spare his successors similar trouble. If interrogated further, however, the judge would probably admit that he had not read ten per cent. of the works, the existence of which he deploras, and that he did not really mean that future jurists should be worse informed than himself. *Cui bono*, then, the intimation that our laws are so voluminous? It is not necessary that a complete and perfect lawyer should read all the books, the existence of which is lamented, and yet it is not desirable that these works should be materially abridged. Like a balance at a bankers, they are of use to be drawn upon, though not to be carried in the pocket. A copious language

aids, instead of impedes, eloquence. There are few ideas, at the same time, present in the mind, but the spirit of knowledge suggests them when required. The mind itself can so direct the order of their suggestion as to arrive, in many cases, at the requisite information. In like manner, the legal mind knows not, and need not know, much law, but only, as George the Third used to say, where to look for it. To abrogate any portion of existing jurisprudence would, therefore, merely set limits to the lawyer's information, but not to his inquiries. He would grope as before, but with less chance of attaining legal certainty.

Neither can treatises be dispensed with. The Digest Commissioners, indeed, have, stated that such works "do not give the aid and guidance that could be afforded by a complete exposition of the law."* They afford, however, a kind of assistance that is rarely furnished by an authoritative digest; for, besides stating what the law is on certain points, they occasionally branch out thence into the outer darkness of the future and discuss hypothetical questions. The commissioners appear to have at first expected that their digest would illumine every obscure region of the law. It is not surprising that the mountain, having laboured with the traditional reult, soon afterwards suffered from a parturient fever aggravated by chagrin at the result of its primary throes. The scheme for a digest has thus fallen into disrepute, owing to the mistaken pre-conceptions of the commissioners, just as the Aristotelic logic was long condemned on account of a previous undue extension of its functions.

Any one who wishes to procure a summary of legal faith will find it in Blackstone, Kent, or some other similar book of jural principles. If he has carefully studied two or three authors of this class, he has sufficient stock in trade to commence business on his own account. When an attorney calls on counsel, he has only to refer to one of the authorities mentioned, and there he will find in the references to cases

* First Report, 1867. p. 6: Parliamentary Papers, Vol. XIX. p. 1

not one but many entrances to the legal maze, by following up the thread of which consecutively he will, as a rule, be able to ascertain to the most minute degree of accuracy the rules relating to any particular point. The more extensive the repertory of reports is, the more complete and certain will be his information.

Now it is impossible to preclude the necessity for searching the legal scriptures, except by means of a digest, which would virtually contain them in miniature. Such were the tessellated Pandects of Justinian; and such also would be the hundred volumes of handy-book once promised by the Law Digest Commissioners. Let us suppose that a digest or code, omitting several material doctrines, acquired exclusive authority; the result would be the amputation of so much law. Judges, then, should either dismiss certain suitors without redress, or suspend the cause until the legislature provided a remedy, or else act upon their own moral discretion.* Now any part of this alternative would be more inconvenient than the present heap of laws piled one above another; especially as this accumulation, like the weight of the atmosphere, is felt by no one. The reports, then, must always continue to enjoy authority. Their alleged inconveniences are not avoided by resort to the dictatorship of a code.

Such a consolidation statute ought, therefore, to exemplify each proposition by cases, if available. Treatises, too, will continue to be as valuable after the compilation of a code as before it. The stable equilibrium of the text of a code or digest, such as we have described, is the resultant of a system of numerous forces, which must be first studied in their simple forms before the student can grasp the laws of their combination. Approved text-books, therefore, must continue to be, as at present, the milk upon which the legal infant will best thrive.

The authority which a code should possess is a highly

* The case of *King v. Hay*, 1 H., Bl. 640, illustrates the hypothesis in the text.

important part of this question. Most persons, indeed, imagine that a code means *ex ut termini*, an exclusive repository of authority. This, however, is not a necessary incident of a code. Indeed, any consolidation tending to ignore existing *rationes judicandi* would not be a code, but a new comprehensive scheme of law reform. A code or digest must be construed according to existing rules of interpretation, except so far as the work itself expressly provides to the contrary. It would, consequently, be ridiculous to interdict the use of philological or jural glossaries of a general nature, and it is equally as absurd to forbid the citation of more particular and relevant authorities. Even if the light of nature and of past cases be shut out, this expunging of supposed doubtful quantities on one side of the equation will be nugatory, unless future decisions are also laid under a similar ban. Without this clearing of the prospect *a parte post*, as well as *a parte ante*, the code will be soon encrusted with new fungi, as troublesome and more anomalous than the old. A total renunciation of authority, however, is not yet dreamed of, and therefore, *pari ratione*, past decisions, should remain in their pristine integrity.

A code, then, should have the authority of a Consolidation Act, nothing more and nothing less. Every paragraph should be constructed as the section of a statute, and consequently, should prevail over any preceding enactment, case, or rule of the Common Law to the contrary. But it should be subject to Common Law rules and to cases, except so far as its provisions are inconsistent therewith. The open domain of the Common Law should be excavated only so far as is necessary to lay the foundations, and raise the superstructure, of the code. The rest of the broad area will afford lateral support to the building, which will constitute the chief nucleus and ornament of the surrounding region, and yet will be composed only of the old materials purified by the fire of crucial experiment, and elaborated with the experience of ages. We prefer this levelling up of the old Common

Law to its complete removal, while the code, under our theory, is nothing better than a fixture, and can be removed, if not found to suit the purposes for which it was designed.

A code will not abridge legal study, but may increase it; inasmuch as the old law, *plus* the code, must in future constitute the grounds which the student is to survey, map, and delineate. Neither can a code be a reading-made-easy for the crowd. As every section in the Consolidation Act is of equal authority, no layman by reading one part only could be sure that his induction was sufficiently copious. He might, indeed, consult the handy-book to ascertain what the phrase "days of grace," or "calendar month," meant. But he would be bold in attempting to survey at a glance the whole law of bills of exchange, which would involve a reference to the part of the code that related to contract and its various and intricate elements of request, assent, and consideration.

A code cannot condense the existing law as contained in cases without destroying their vitality, and changing their real significance. Law reform is *dehors* its province. It properly acts only upon existing law; and, therefore, it cannot remove any inherent difficulty at present incident to a legal rule. In short, the supposed uses of a code in simplifying the law are to a great extent visionary, while any advantage it possesses in this respect could not be realised for several decades. All these years must elapse before the old law, so far as it has been repealed by the code, can become really obsolete. Reforms of doctrine as well as of procedure, however, ought to precede codification, and the labour of consolidation be applied only to those cases and statutes, the substance of which is intended to be permanently preserved. In composing a legal system founded upon the equation of legal rights, or the reduction of all interests in property to one denomination or class with common incidents, the codifier will fulfil the best functions of a law reformer. He will impart a novel degree of simplicity to legal investigation: yet, every rule of the new code will be defined by myriads of past decisions. A code or

digest compiled on this eclectic and unspeculative method would be chiefly founded on the equity reports. Not much more than half of these, however, would require to be digested, inasmuch as the remainder is concerned with defining the boundaries of law and equity, or the law of demurrer. Before the proposed Commissioners undertake their task, we would earnestly recommend them to sketch the eclectic model to which they intend that the ultimate legal fabric should conform, and to digest only the cases suited to such an edifice.

A code compiled on the principle of equalizing or assimilating all jural rights is, we believe, the *ne plus ultra* of consolidation. But howsoever a code or digest may be compiled, it certainly will have the following advantages over the present dislocated condition of the law. It will be a convenient and comprehensive repertory for reference in Court, and will thus furnish assistance which no unauthoritative text-book can supply. Local Courts will derive a peculiar benefit from this use of the statutory handy-book, while it will constitute a good part of the fixed capital of many an advocate in whose able hands it may often be found a complete and perfect magazine. For the great majority of cases it alone will be consulted, though a difficult question can only be determined by reference to other authorities.

But it is in respect of future legislation that a code will be found chiefly useful. Every new Act will refer to its appropriate chapter in the statute book (which possibly may consist of not more than a few volumes); and will be thus located on its proper inheritance. It will suggest fresh compressions and the positive repeal of more and more common law rules, until in the course of time the code may be found really to comprise within itself almost the whole armoury of the common, as well as the statutory, law. If the reports, then, became gradually obsolete or absorbed by the code, the latter might possibly, in the course of time, be endowed with the plenary and exclusive authority which it would be hazardous just now to confide to a wholly new and isolated

compilation. We are not sanguine, however, of this result ; while at present the project of conferring exclusive authority upon a digest is too extravagant to require a formal refutation, at the same time a general consolidation of some kind is necessary, not only for imparting a philosophic outline to our existing jurisprudence, but also for facilitating the ordinary course of legislation in future. Even a mere digest without reforms, such as the late commissioners contemplated, is much better than no consolidation at all.

One of the chief advantages of a code would be that when heterogeneous amendments were made in a Bill while passing through committee, (a fortune necessarily incidental to measures affecting a variety of interests), the Act would be taken to pieces and the *disjecta membra* allocated to their appropriate headings in the code. At present this cannot be done, and the old statute, which, almost in the same breath, regulated the importation of horned cattle and the stamp duty on apprenticeships to attorneys, has ever since retained its pristine unsymmetrical shape. Each cloven foot would, under the code, be found in its own place, and would refer to the chapter of the work to which it naturally belonged. It was, perhaps, one of the objects contemplated by the ancient custom of drawing up complete Acts only at the end of the Session, to enable the technical jurist to adapt the luxurious growth of each Session to the technical requirements of an harmonious system. On the other hand, in the absence of a code, it would be useless to appoint a legal officer or board (as the Statute Law Commissioners recommended in their Second Report), to advise on the effect of each measure submitted to Parliament. Such officials, no doubt, would take care that the Legislature passed no Bill, the technical results of which would be unexpected. But the issue of a few good coins could have no appreciable effect in enhancing the value of a large debased currency. The present legal coinage is worn and deficient in weight, and passes only from necessity. It requires to be wholly minted anew. The old coins, however, contain gold enough for an

improved circulation. Any reduction in the quantity of metal, effected by the equation of jural rights or otherwise, will be compensated by the more extensive operation and greater efficiency of the new issues. The Government and nation have gone too far in the direction of a code to recede now with credit, from making that laudable and certainly innocuous experiment. The Statute Law Consolidation Commissioners ought, we think, to be released from their present labours, which are of little use, and be rehabilitated for the more general purposes of a digest. They are men of action; they have been faithful in a few matters; they should be placed over many. This course is, perhaps more desirable than a revival of the Digest Commission, or the appointment of a body to consolidate the reports separately, as the Lord Chancellor contemplates.

As procedure is entirely distinct both from codification and legal reform, the Judicature Act, 1873, was very properly passed without regard to the failure of the Law Digest Commission. Procedure is one of the most important and costly phases of the law. It should, therefore, be finally disposed of as soon as possible. The new rules, it is to be feared, have still left much to be desired in respect to fewness, brevity, and simplicity of pleadings. After attaining these results, the next step that should be taken is to work out what we have termed the equation of jural rights. Our jurisprudence will then be fit for codification. As to reforms of a political nature, such as Mr. Locke-King's Real Estate Intestacy Bill of last session, there are but few speculations of this class likely to become laws at least during the present Parliament. It is, therefore, immaterial whether their discussion by the legislature precedes or follows codification. But, as that is a laborious task, it should be resumed at an early day, and concurrently with, or, at least, soon after, the kind of reforms which we have designated as the equation of jural rights.

II.—THE QUEEN'S PROCTOR.

THE post of Queen's Proctor appears to be one of the "plums" of the profession, to judge from some remarks that were made at the Annual General Meeting of the Incorporated Law Society, held in July last. It appears from the published reports of the proceedings that one gentleman observed that there were in Doctors' Commons some very valuable appointments. The first was that of Queen's Proctor, and there was a rumour that when the office became vacant, it was to be made a branch of the Treasury with a Queen's Counsel or a barrister of 10 years' standing at the head of it.

The office of Queen's Proctor is of ancient date, but the powers and duties of the Queen's Proctor have been recently altered, and perhaps modified, by the Probate and the Divorce Acts. Originally the Queen's Proctor was a Crown officer in the Ecclesiastical and Admiralty Courts, and nearly all proceedings in the Ecclesiastical Court, in questions of Probate, had to be brought before the notice of the Queen's Proctor before they came before the Court. Now, however, we believe that the only Probate cases, in which notice has to be given to him, are those of the administration of the estates of intestates dying without any known relations, and the administration of the estates of bastards. In Admiralty he appears in cases where any of Her Majesty's ships are concerned.

When the jurisdiction of the Ecclesiastical Court in matters matrimonial was transferred by 20 & 21 Vict., c. 85, to the Divorce Court, that Court then had the power to pronounce a decree for dissolving a marriage if it was satisfied that the case of the petitioner was proved, and that there was no collusion; but afterwards by 23 & 24 Vict., c. 144, s. 1, every decree was, and now is, in the first instance to be a decree *nisi* not to be made absolute until after the expiration of at least three months; and during that

period any person is at liberty to shew cause why the decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not having been brought before the Court, and at "any time during the progress of the cause, or before the decree nisi is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient, and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit, are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses and otherwise arising from such intervention to be paid by the parties or such of them as it shall seem fit, including a wife if she have separate property; and in case the said Proctor shall not be thereby satisfied with his reasonable costs, he shall be entitled to charge, and be reimbursed the difference as part of the expense of his office." And this law, with respect to the intervention of Her Majesty's Proctor, is further extended by 86 Vict., c. 31, s. 1, to suits for nullity of marriage. And, by 23 & 24 Vict., c. 144, s. 5, "In every case of a petition for a dissolution of a marriage, it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the direction of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matters, and which the Court may deem it necessary or expedient to have fully argued; and Her Majesty's Proctor shall be entitled to charge and be reimbursed the cost of such proceeding, as part of the expense of his office." The marginal note of this section does not, however, seem to mean quite the same thing it is.

" Court may, when one party only appears, require counsel to be appointed to argue on the other side."

That some such officer as the Queen's Proctor should exist is no doubt necessary, and we do not in any way suggest the abolition of the office. If any change is to be made, we think that, so far as the Divorce Court is concerned, the Queen's Proctor might in future be considered one of the official staff of the Court, and all papers might be laid before him in order that he might, intervene if he found any reason to suspect collusion, in order to prevent the Court from being imposed upon and being put to improper use.

Certainly as things are at present arranged in the Probate, Divorce, and Admiralty Courts, the Queen's Proctor does work, some of which might be equally well done and possibly more cheaply by the Treasury, and he also does work which requires a combination of the knowledge of a Proctor, and the faculties of a detective. The Probate work might be done by the Treasury, because this consists in reality of little more than claiming for the Government the duty of £10 per cent., but the work of intervening in Divorce causes should still be intrusted to some person thoroughly well acquainted with the forms and practice of the Divorce Court, who might still be called the Queen's Proctor, and enjoy all the powers and privileges the Queen's Proctor now enjoys. But there is one thing to be considered, and it is that the causes which come before the Divorce Court in London come from every part of England and Wales, and if the Queen's Proctor has to satisfy himself that there is no collusion in many cases that come before the Court, or if, under the particular direction of the Court, he is to make inquiries into the behaviour of parties residing in Northumberland, Cornwall, Wales, and Norfolk, all at the same time, it is evident that he must have a large staff of competent clerks or deputies at command to send off to the neighbourhood in which the parties reside or have resided. These clerks would require to be intelligent men, with a dash of the detective in their composition, and would also require to be, to

some extent acquainted with the peculiar practice of the Divorce Court, or else he must have an extended system of agents. The expense of such an officer would be large, as the expense of the Queen's Proctor and his office probably is now.

No doubt the post of Queen's Proctor in the Divorce Court alone is a valuable appointment, seeing that he nearly always gets his costs. This may encourage zeal, but it does seem rather hard that when, as in the case of *Suddick v. Suddick and Glendining*, reported in the *Times* a few months back, the Queen's Proctor intervened, making various allegations, and failed to establish them, the unfortunate suitors should not be able to get their costs.

In fact the Queen's Proctor is an expensive necessity in the Divorce Court; without him a divorce suit might be a simple farce; he insures the *minimum* of imposition, and for that alone he deserves to be well paid.

III.—OUTLINES OF PENOLOGY.

By JOSEPH R. CHANDLER, of Philadelphia.

THE new zeal, "a zeal according to knowledge," of late displayed in the interest of humanity has become so active—and proves of so much importance—that it has received special direction and particular designation. While the sufferings of the prisoner have ever since the existence of a prison excited commiseration, and the relief of the incarcerated was commended to the charitable interference of the humane, it is only of late that interference for the prisoner's rights, or a redress of the prisoner's wrongs, has come to be of united consideration, and the construction and administration of prison-houses have been regarded with any other aim than that of detention and punishment. The terrors of their cruel possibilities have been presented, enriched with

the fancy of the historian, the novelist or the poet, and the prisoner has been the exponent of social, civil, and spiritual bondage. Few have thought of the possibilities of benefits from incarceration, resulting from mental experience and the discipline of thought.

Certainly to an educated man, the man of books or worldly experience, the man of fixed plans, and with absorbing objects, the prison may be a beneficial school from which the thinking man may graduate with honors or with distinction. Certainly the occupant of the Egyptian prison came out to be the ruler of the subjects of Pharaoh, and the prisoner in the fortress of Ham was called from his school of thought to to be ruler of France. Joseph kept on thinking; Louis Napoleon yielded to dreams; St. Peter and St. Paul taught the world by their prison experience; and the Duke of Bedford has just erected a monument to Bunyan, who thought and wrote his *Pilgrim's Progress* in the cell of the Bedford prison.

These instances show the capabilities of the human mind under what are called adverse circumstances, and illustrate the influence of solitude. None of the prisoners alluded to were felons, and only the Egyptian minister was charged with acts which are not considered virtuous under some circumstances. The effect of separation upon the felon will be considered when the systems of imprisonment are discussed.

The subject of prisons and prison discipline has occupied so much attention of late that there have been formed parties in the school, and the zeal which seemed to be for the general end has almost naturally been directed to a consideration of the means; and as there can now be little difference of opinion upon the propriety, not to say duty, of making the imprisonment of the offender a means of benefit to the community by the improvement of the individual, it is best to consider first what system is most conducive to his improvement.

It is evident that States and Communities which are

occupied with the subject of penitentiaries, prisons, and reformatories, are, considering the subject of fiscal economy, a subject of much importance to taxpayers, and always to be kept in view, as the cost of building and maintaining a prison may be made a means of considerably augmenting public expenses, without providing any corresponding good.

Some who have had experience in the administration of public affairs have gravely considered how prisons may be made a source of profit to the community by the sale or use of the products of the prisoner's labour, subordinating the idea of the improvement of the felon to that of the public revenue.

In some places the old plan of building prisons and maintaining them simply for the purpose of detaining persons suspected of felony or of punishing them when that felony is proved, is yet the limit of efforts with regard to prison discipline, and, of course, the object of the law naturally influences its administration—and cruelty in insuring detention and punishment almost invariably attends this system of imprisonment. This mode of punishing persons charged with unlawful acts, and declared guilty of offences, though generally condemned, is much more practised than is supposed by persons who dwell on theories of penology ; but its general condemnation, notwithstanding its prevalence, renders it unnecessary to argue for its abolition.

Within a few years Congresses, "national and international," have been held on the subject of prisons and protectories of all grades, and much information as regards prisons and prison discipline and prison economy has been gathered, to the general benefit of the science, and few who have attended these assemblages have failed to acknowledge that they have acquired valuable information from the details of experience of members from various parts of the world ; and knowledge of the operation of systems, or of practice without system, is of vast importance in any attempt to form a new system, or to recommend one that has been tried.

To a person experimentally acquainted with the manage-

ment of prisons it was evident that the discussion in these Congresses (take for example that held in London in the summer of 1872) did not lead to any definite embodiment of a plan. The time of the Congress was profitably employed in the explanation of the operation of prison laws, as they are administered in the United States, in Great Britain, or on the Continent of Europe, and parts of Asia, especially in British India.

The earnest eloquence of some of the expounders of systems and practices incurred a sort of conviction at the time which examination or opposing explanation considerably disturbed.

Systems, too, were applauded for the favour which they had secured from committees, the popularity they had achieved, when a closer investigation led at last to the inquiry whether that popularity was founded on the positive beneficial character of the system, or whether it was not applauded because it was an improvement on a long continued practice that in reality had no system. The time has come when the positive and not the comparative benefits of a system of prison discipline must commend it to approval and adoption.

There are several divisions of the subject of Penology which demand attention in their proper order. For example, the government of prisons as a part of the administration of the internal affairs of a State; such, for example, as is found in Belgium, and especially in Italy. In the latter named kingdom, the government of prisons, the appointment of officers, and the regulation of rank and the prescribing duties among those officers seem to be as much a departmental matter as is that of the Army or the Navy. It is a branch of "justice," and it would seem that this national or State organization of penitentiary and reformatory affairs could be made without or previous to any plan of prison houses, or any desirable general system of prison management.

In the usual order of arrangement it is customary to consider the plan and construction of prison houses. But as the arrangement of space for the size and situation of cells and for their proper furnishing must depend greatly on the

system of government and discipline to be adopted, it is better to postpone the consideration of the form and divisions of the building till it be known which of the many systems of treating prisoners is to be adopted.

There are prisons, undoubtedly a large majority of those occupied, in which no system is thought of, excepting, perhaps, that of keeping the inmates close till the sentence time of the prisoner shall have expired. The treatment in these "jails" usually corresponds with the character of the jailor. In some prisons, in Pennsylvania, the convict is treated with a rigour that shocks humanity; in others the jailor, being also sheriff of the county, finds it convenient to intrust the care of the prison to the only convict it contains, while the sheriff is out in his bailiwick looking after more tenants. In these cases there is no system to discuss; all that can be done is to condemn the practice.

There are three plans called systems of prison discipline. First, the congregate system, that of keeping the convicts together in their labour and in their rest, causing them to work all together and sleeping in a common dormitory at night.

Another system, or rather branch of the system, is that of employing the prisoners in gangs at labour during the day, and to lock them up in separate cells, only one in each cell at night. These and their modifications are all called the "congregate" system. They allow intercourse among the prisoners: the second, all day; and the first, day and night. That intercourse is more or less free according to the discipline of the place. It always exists.

There is another plan known generally as the "Irish system," but which ought to be called the "Crofton system," as it was the invention of the Rt. Hon. Sir Walter Crofton, who applied it to the convicts in Ireland, where the most unsystem-like treatment of condemned prisoners had prevailed, and where, by the operation of the Crofton system, immense good was secured to the felon, and through him to society. This Crofton system consists in a severe treat-

ment of the convict, who, for a certain time, is kept in solitary confinement and on hard fare, and is then admitted to privileges which are gradually enlarged, and liberation from the prison house usually precedes the completion of the time of the sentence. This system commences with separate confinement, and concludes with a sort of social enlargement and police surveillance. We shall hereafter compare it with other systems; meantime, let the high praises which it receives, and which it in some measure deserves, be considered in connection with the circumstances of Irish prisons before the Crofton system was put into practice. We must distinguish between positive and comparative excellence.

The third plan is that of separate confinement, by which no prisoner sees another prisoner from the time he enters the prison till he leaves it.

The modification of the separate system is not in permitting occasional intercourse among the convicts, but in enlarging the liberty of visitation by friends, relations, or moral and religious visitors; an augmentation depending entirely on the merits of the prisoner, and serving to keep alive domestic affection, and strengthen moral resolve.

I hesitate not to say that the system of separate confinement of convicts is the only plan by which all the advantage of penal imprisonment can be secured to the safety of the community by the withdrawal of an offending member, and the consequent absence of a bad example, and the improvement and instruction to society of a member who, from thinking and doing wrong, has been induced to make resolves of reformation, while, at the same time, means and inducements are provided to give efficacy to these resolves. Evil associations are poor means of making men better. Very few, indeed, make any advance in a career of vice without the instruction, encouragement, and applause of others.

When a violator of the law is sentenced to imprisonment the natural remark of the community that has suffered by

his violence or his depredation is, "we are free from his villainies only for the time of his sentence," but it is rarely considered that a penitentiary can be a school of crime in which the pupil may be advanced in the art by which they obtained entrance, and admitted to higher grades of professional employment.

But how can we admit, as nearly all do admit, that it was evil associates that sent the convict to the penitentiary, and not believe that the same, or worse, evil associates will augment his criminal skill and increase his desire for its exercise ?

But it is urged against this separate confinement that it is cruel to the prisoner, and that, shut out from all intercourse with his fellow-men of every kind, he loses all sympathy with society, and cherishes a hatred in prison that suggests plans of vengeance when he shall be released.

Such an idea is not unfounded ; in consequence of deprivation of liberty, bad passions are not likely to be repressed in men who have lived in open violation of the laws of God and man, and upon the spoil of their fellow beings.

But this idea, so well sustained by the experience of those who have witnessed protracted solitary confinement, or have noticed the influence of the congregate system upon almost any class of offenders, is unjust towards the separate system, which is, indeed, anything but "solitary." The separate system in Pennsylvania, as practised in the Eastern Penitentiary of that State, consists, in the first place, in the entire isolation of the convict from the time he reaches the prison until he is discharged, that is, a complete isolation with regard to any and every other convict in that prison ; not to be seen by or to see anyone of his fellow prisoners in sickness or in health, in labour or in rest, in common or in worship. And from this system of isolation the humanitarian, who knows no more of the separate system of prison discipline, devises his most positive argument against the separate confinement of the convict.

I have stated one point in that system, that of perfect separation from other convicts. But that separation is perfect only with regard to separation from the other convicts. The prisoner in the Eastern Penitentiary, and in every other prison where the separate system prevails, has three visits a day from the persons who supply him with food, and though little conversation can be allowed at such a season, yet the prisoner has at least a vision of "the human face divine" as often as he takes his meal. Some of the officers of the prison see and converse with him frequently in the course of the day, and men who have a direction and supervision of his work talk with him about the manner of increasing his skill in the particular branch devolving upon him.

The stated "moral teacher" is regular in his visits to the cell, and ready to propose or to answer questions; and that officer is followed by the school-master, with his lessons of common school education, and all are willing to add the means of special knowledge. It is well known that men of high education have been tenants of the Penitentiary cell, and have passed much of their time in a review of, or advance in, classical and mathematical studies, and such persons have been supplied with means of pursuing their favourite branches of science, and benefits, at least to a prisoner, have resulted from these renewed studies.

In addition to the visits of the officers and employés of the institution, there should be mentioned the regular permitted visits of the relatives and friends of the convict, and the frequent official calls of the inspectors of the prison. That certainly does not look like solitary confinement, the separation of the felon from all intercourse with human beings, nor the fulfilment of the idea that in all that time he has no knowledge of the world, nor had "the voice of a friend or kinsman" breathed through his lattice.

But still, further, there are visitors to the cells of the penitentiary who have nothing to do with the government of the place, and have no connection by blood or former friendship with the prisoner. Some of these persons are seen

every day within the cell or at the door; there dealing gently, kindly, and in the spirit of purest philanthropy with the inmates, seeking to alleviate the misery, and to elevate the aspirations and purify the motives of the prisoner. One point very essential to the completeness of this system still remains for notice. The religious views of the convict are respected. He may be called on to hear certain general speaking, or preaching, by persons who are employed to improve the Sabbath hours of the prisoner, and who, to prevent any evil from positive doctrines, cut off most of the chances of good by a general negativeness, but the convict has and improves the right of frequent visitations from clergymen and pious laymen of his own religious denomination, and his entire separation from all other prisoners gives to these frequent religious communions a freedom of confession and instruction, of proposition and advice, that could not be enjoyed by the prisoner of the congregate system.

And while all these are in operation the convict is learning some trade or pursuing his former legitimate mode of earning a living in his own cell. Of course the kind of trade taught or practised there must have some relation to the available space. Ship building, house building, engine building, and some other important branches of mechanic art, could not be carried on in the twelve by twenty feet workshops of the prison. But even there vast acquisitions of theoretical knowledge in those and other branches could be and have been made by restraint and the resort to thought and studies. Surely, surely, this is not the realization of the terrible bugbear with which certain sensationalists have tried to alarm the philanthropist. This is not the confinement that ruins the health, and weakens the mind of the prisoners. Those who have attempted to represent separate confinement as a great cruelty, have dealt entirely with fancy or wilful misrepresentation. The explanation which I have given above of separate confinement is founded on fact; nay, it is fact, and is the exposition of an existing institution and its administrative operation—the Eastern Penitentiary of the State of Pennsylvania.

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I have called this system "separate." Some denominate it the "Solitary System." The Hon. Richard Vaux, who understands, from more than thirty years' experience as an Inspector and from careful observation on the administration of almost all systems, the subject now under discussion, gives to this mode of dealing with prisoners the name of "individual system," a name most correctly expressive. The prisoner is removed from all the evils of bad associations, and he is brought into immediate accountability with one person. A general dehortation may touch a part of the error of almost all who are addressed, but in "individual dealing," not only the crime of the offender may be considered, but that part of it under circumstances which made it particularly criminal will be exposed, and the proclivity of the prisoner's taste and appetites and his evil tendencies will be considered.

There are no two men, though committing the same act and from the same general motive, equally guilty, who may be best dealt with by exactly the same mode. The person who enters the cells of convicts goes thither to "minister to a moral disease—a conscience diseased, certainly a conscience that lacks the vitality necessary to true moral action." The visitor may learn something of crime—its cause and its operation in his visit to other cells—but in that one his business is with one man, and he must as carefully study that man's case as does the regular physician of a hospital the condition and peculiarities of any one patient whom he may visit. And it is confidently asserted that the diagnosis of the mental disease of a convicted felon is to be as closely studied, and is as attainable as are those of the hospital patient who is suffering from small-pox, cholera, or typhus. The skilled moral visitor administers his instruction, his caution, and his hopeful directions to the convict with as much judgment and as much regard to the characteristics of the prison cases, and as much discrimination as the physician of the hospital exercises when he presents the ingredients of his prescriptions.

This is personal individual dealing, the result of separate

confinement, one of the great benefits of that admirable system.

The subject of solitude and its effects thus disposed of, two objections, however, are supposed to lie against separate confinement. One is its injurious effect upon the body and mind of the convict. No argument will serve in this view of the question. It is one of facts.

Do the inmates of the Eastern Penitentiary of Pennsylvania present a greater proportionate number of sick than do prisons conducted on the congregate plan? And is the number of insane, whose misfortune is due to confinement, greater in the prison-houses of the separate system than in those where the social or congregate system is administered?

A comparison, instituted a few years since, taking actual returns of prisons of both systems, shows that more insanity has begun and increased under the congregate than under the separate system. One fact with regard to insanity in prisons should be noticed, as it may be depended on. Much less of insanity is caused by imprisonment of any kind than is generally supposed. Returns from Belgium, and particularly from Germany, where the separate system is used, show that not many cases of insanity are referable to confinement, and fewer of them in separate than in congregate prisons.

The truth is, that insanity in prisoners is often the result of some sudden emotion in earlier years, or the development of hereditary mental disease. Sometimes it is the discontinuance of intemperate habits; sometimes it flows from the adoption of a vice; rarely, the result of simple seclusion.

In referring cases of the insanity of prisoners to any system a great error is committed. The insanity of prisoners who have held desirable social positions in life may frequently be referred to the sudden exposure of a criminal course and to a deep sense of degradation consequent upon imprisonment. In such cases the morbid sensibility of the insane convict must receive additional wounds from the exposure which the

congregate system renders unavoidable. With such prisoners, when the crime can be no longer hidden, it is best to hide the criminal.

It is easily established that insanity is not imputed to the entire separation of convicts from convicts in prison. That "solitary" confinement, the entire separation of the prisoners from all human association, may augment a morbid tendency of the mind, and, perhaps, induce it, is not denied. No argument is made upon that point, because, as has been stated above, the separate or Pennsylvania and Belgrave system of separate or individual dealing with prisoners, admits of no solitary confinement, unless it is a punishment for gross offences against prison rules, and then the solitude is usually limited to twenty-four hours.

One advantage, and, to the prisoner, an almost incalculable benefit, results from separate dealing. In the congregate system, where the influence of the free and quiet ministrations of moral visitors has been experienced, the prisoner, though he has tried what repentance can do (and begins to ask, triumphantly, "what can it not do?"), is suddenly met by a recollection that prisons are usually regarded as, at best, only places for the punishment of crime, and the time spent there is considered only a sort of temporary reprieve of society from the evil visitations of the offender. And he knows that in general, though the released convict may try to escape from the contagion of the vices of his released prison companions, yet they are likely to follow him up—and invite his aid if he has no better pursuit—discourage him, tax his small means to purchase silence, which must be purchased till those means are gone, and he is driven by poverty and despair to return to the crimes and the criminals he hoped he had in repentance and improvement provided means to avoid. The graduate of a prison, whose separate confinement and individual dealing are invariably proclaimed, may leave the prison poor, and may find difficulty in establishing himself for want of some little capital, but he has in his separate prison confinement

seen no fellow-prisoner, made no new acquaintance among felons, nor recognised any of his former evil associates.

When he has taken a position in which to carry out his resolution of good, he is in no apprehension of the visitation of those who levy "black-mail." He has lost so much time in prison, but the fulfilment of the sentence of the court has enabled him to understand his own weakness and to guard against former assaults. Such has been the extent of this recognition of prison companions that prison legends abound in anecdotes of the discharged convict being driven from desirable positions back to prison by the visitation of some prison companion. Novels, poems, and dramas are founded on this result of congregate confinement, or felon association. From this monstrous evil the separate system almost entirely relieves the convict.

One other objection is made to the separate system. It is declared that it does not admit of some of the employments that would make the prisoner profitable to the community. It does not allow of working together, and thus increasing profits by diminishing cost of supervision.

And it is said that the congregate system insures that result in some cases, and generally more nearly approximates it than does the the separate system.

It is not proposed to take issue on that question. It is probable that, owing to some favourable circumstances in their location, large prisons (usually State prisons) have been made to produce more than the cost of maintaining the prisoner. In some places lime stone abounds, and granite is procurable in large quantities and good qualities. Prisons built in these localities have employment for their convicts in getting out blocks of granite, or supplying kilns with lime stone, and by the interference of contractors (a sort of middle men) regular employment out of the prison is given to a large number of convicts.

In other prisons various kinds of manufactures are carried on by the inmates, and the personal power of the prisoners is placed at the mercy of men who care no more

for the improvement of the convicted offender than he does for the mules that take away the work.

In the cells of the separate prisoners many kinds of work may be carried on to a profit. Boot and shoe-making, (weaving, once the principal employment of the convicts, is rather out of date), lathe-turning, jewel manufacture, and other modes of earning a living ; but the heavier work, stone quarries, &c., cannot be done.

The moneyed results of the congregate labor may be more than those of separate works ; but, in return, the moral improvement of the convict is almost certain in separate confinement, while any improvement is almost impossible in congregate labourers.

The great ends of imprisonment, it has been asserted, are the safety of society by the incarceration of felons, and the moral improvement of the man who is to resume a place in society.

The first object is nearly though not quite as well attained by the congregate as by the separate system. Most of the escapes from prison are indeed effected by the co-operation of the convicts, and such a co-operation would scarcely be possible when separation is strictly enforced. But that point need not be pressed.

It is not likely that the improvement of the prisoner can be extensively ensured in a congregate prison-house. Even closely watched as the prisoners may be, it is known that compacts are made, and frequently fulfilled for mutual aid in effecting escape. The intercourse of a few who feel the unprofitableness of a life of crime with the many who have no intention, no wish to adopt any legitimate mode of earning a living, is sure to increase the number of bad by diminishing the number of those who under better circumstances would become good. All, or nearly all, might become better if ridicule and the bad atmosphere of felony were not operating against reformation. It is an error discoverable by those who visit prisons to suppose that the man called a "hardened convict" has not some remains of passive virtue

that need only the electric touch, or rather the application of affectionate interest. "None are all evil," and of the thousands who seem to be regarded and to regard themselves as utterly reprobate a very large proportion could be, as many of their kind have been, recalled to thought, to good resolves and to a blameless course of life; but they grow worse, and become a fixed figure for scorn and detestation of the good—of envy of the bad—and, because men will not make an opportunity to give them the chance of reflection and benefit of separate, individual dealing, they perish, they die to social life, and their moral carcass infects the atmosphere with a terrible poison.

Among the many arguments and perhaps the most effective used against capital punishment, is that founded on the fallibility of all courts of justice, and the possibility that the jury which brought in a verdict of "guilty" against the man tried for murder, may have been misled by prejudice or influenced by a knowledge of only a part of the circumstance and by public clamour, or the erroneous testimony of witnesses, and thus have given a verdict against the prisoner which would lead the judge to pronounce a sentence of death. And "after discovered testimony" might show that in execution of the sentence an innocent man had been put to death. Of those who are tried, pronounced guilty, and sentenced to the penitentiary or county jail, it may justly be supposed that some are innocent. It is worse than capital punishment, worse than the gallows or guillotine, to place such innocent convicts in the company of scoundrels of the worst kind. Nay, supposing even some or all of these convicts were guilty of all that was charged upon them in the indictment, is it just to act as if every fibre of their hearts was twisted into crime, and there was no hope of alluring them into repentance, and no desire to make that repentance available to the benefit of their future life and to the advantage of society?

Every just sentence of a criminal court should be executed, no affectation of excessive philanthropy should be allowed to

stand between the criminal and just and legal punishment ; but righteousness, true philanthropy, a regard to the interests of society, should see that the punishment of the felon, short of death, should be for his benefit ; at least, should not be made the means of advancing the convict in crime and multiplying criminals.

In enumerating some of the best known systems of prison discipline particular reference is made, in the early part of this essay, to the " Crofton system," and while the separate system is under consideration, it is pertinent to notice that in the first named branch, a year or more in time of the " Crofton " plan includes the separate system. The convict when received is placed alone and kept alone, with very hard fare and severe treatment, and in most cases this preliminary proceeding is sufficient to force from the prisoner a promise of good conduct while he is in the hands of justice. It is scarcely possible that he would, by bad conduct, earn a continuance of the first stage. He is said then to have so much improved in his solitary confinement that he is prepared for the enlargement contemplated in the second stage, which admits of congregate labour by day, and holds out the hope of a third stage, which allows the advanced convict to work abroad under the surveillance of the police and the liability of being sent back to the prison to re-commence at the first or second stages of the system.

The particulars of this system are well set forth by its friends, and only generally referred to here that a comparison may be drawn between the " Crofton " system and the separate system. Without doubt much benefit has resulted from the " Crofton " system in Ireland, and many convicts have been returned to society by being passed through the several grades. But it will be noticed that the first stage is that upon which hope of success is founded. And if those hopes are even only partially realized the success is due to the enforcement of the separate condition of that stage whose consequences seem to be felt in the succeeding portions of the system. Every stage beyond the

first brings together the convicts; they are employed together, they work and talk together, and their experience in the second stage is chiefly that of a prisoner's life of crime, and the year of hard, almost cruel, treatment. The last stage which is really that of the "ticket of leave" is a mortifying surveillance.

But it is said that convicts have been benefited by this system, and the argument for improvement is sustained by the fact that many who have passed through the grades have never returned to the prison. Such a result may well be regarded as an argument strongly favourable to the system, and it must be confessed that it would be conclusive if there was not ample proof that these graduates of the Irish penal institutions enter an advanced degree in the Penitentiaries of the United States. Fifty of these are known to have been in the Eastern Penitentiary of Pennsylvania, bearing with them certificates of good conduct. Twenty dollars will take one of these graduates of the "Crofton prison" from Ireland to the United States, where, beyond the watchfulness of a police informed of his name and aliases, his pursuits and his branch of crime, and his place of resort, he is comparatively safe.

The congregate system, whether wholly or partially carried out, is a school of crime, with ushers, teachers, and professors for every class; and with an improvement in the pupils corresponding with the experience of their teachers, and the opportunity of imparting lessons. Scholars willing to learn usually make rapid advance, even under adverse circumstances.

It cannot be denied that the separate system does not so far promise to be as near self-sustaining as it is said, and as it is admitted the congregate system is made in some of the penitentiaries. And that admission may be used, as the fact often is, as an argument for the advantage of the congregate over the separate system.

It would be scarcely worth time and space to demonstrate that to improve a man is better than punishing him. And

though a prison be self-supporting and thereby lessen taxation, still there are many who will admit that though money paid into the public Treasury is convenient to the Government, yet society would not suffer such a consideration to outweigh the value of the restoration to usefulness and respectability of an offending man.

While speaking of the danger from evil association of prisoners in the congregatc system, we can scarcely forbear copying a part of a paragraph from a small volume by Miss Mary Carpenter, illustrating and commending to approval and adoption the "Crofton system." Miss Carpenter is known for her zealous devotion to the work of preventing vice among the unprotected of her sex. In applauding the Crofton system she takes occasion to show what are the dangers that must beset the path of the young, and, singularly enough, while advocating a system that in the second and third stages permits intercourse among convicts, she quoted from the confession of a youthful offender who had suffered imprisonment for crime and is willing to tell how he felt.

After mentioning that his mind was injured by the perusal of such books as the Newgate Calendar, Dick Turpin, Jack Sheppard, &c., &c., the culprit says, "I was arrested and got one month's imprisonment at Selford House of Correction, which made me worse than ever, through having so much liberty for talking, there being three or four in a cell, and forty or fifty in a yard. There, hearing them talk about the robberies they had committed without being apprehended, I thought I would try myself. So when I got my liberty I started with a fresh gang for stealing."

Could there be a stronger argument against the congregate system, and, consequently, in favour of separate confinement than the statement of the unhappy man from which the above extract is made? And yet any person who has spent much time in prisons and held free conversation with the inmates, must have many such anecdotes with which to strengthen his arguments against congregate imprisonment.

While the superiority of the separate system is unhesitatingly proclaimed, a superiority that extends to every point of consideration, excepting immediate fiscal profits, it is not to be denied that other systems are productive of much good. Every system, indeed, may be praised for the positive benefits which it has wrought. But an examination of the means and results will satisfy an experienced person that the good obtained is greatly due to the immediate administration. Indeed, the best system (the separate) would fail without that personal, individual application, which has been the main source of the importance any other system has acquired.

The writer of this article has had many years' experience in the direction of a prison, and in the training of prisoners, not as a salaried officer, but in the discharge of the duties of an honorary appointment, and he has applied, as far as circumstances would permit, the theory of separate or individual dealing with prisoners, especially with female convicts, and the success has been so marked and gratifying, that no doubt is entertained that greater completeness in the construction of prison houses, and more ample means to direct and aid the discharged convict, would result in very greatly extended benefits.

The aid of discharged prisoners is an essential element in the work of prison science. Without that most of the labours of the moral teachers in prison must prove unproductive. The circumstances of prisoners in county jails differ in some particulars from those of convicts in a penitentiary. Both have convicts, and these, of course, require nearly the same treatment and the same consideration.

There should be an agent, or officer, to have some place provided for the discharged convict, to see that he is not driven to a renewal of crime, and that his efforts for obtaining a living are not made fruitless by a want of some continued watchfulness and advice, and some pecuniary aid.

But in the county prison are found, besides convicts, all who are receiving light punishment, or awaiting trial. Many

of these are quite innocent of the offence charged. The offences of some are really almost imaginary, and in most cases the family suffers more by the absence of the father or mother than society would by the release of a dozen evil-disposed persons. An agent to interfere in such cases, to settle the difference of litigant parties, to provide a home for those that are homeless, and to be the friend to the friendless in court, to answer the pressing calls of the oppressed, and to investigate the cause that he knows not to seek out, is almost an indispensable officer of the county prison.

Penology, then, seems to include not only the pains of imprisonment, but all that relates to crime from the law which defines the offence and prescribes the penalty, to the court that declares the character of the particular offence and prescribes the punishment, to the plan by which the State shall direct the administration of the penal laws, the system by which prisons are to be conducted, and to the plan and construction of prison houses to suit that system.

When, then, a State has established a given system of prisons, has passed penal laws, established courts of justice, has selected a system of prison discipline, has constructed prison houses adapted to that system, and provided money and means to secure and reward the services of a faithful agent and servant, it may be said to have a penitentiary system. Of course, as partly penitentiary and partly preventive, there must be a house of refuge—a place of early reformation, &c.

With regard to modes or plans of prison discipline, that of the separate system practised in the Eastern Penitentiary of Pennsylvania, in the United States, in the kingdom of Belgium, and in other parts of Europe, is regarded by the writer of this essay as beyond all question the best ever invented and applied.

But the effect of that system must, in a great measure, depend upon its special application.

The officers of the prison, the chief, the warder, the superintendent, the governor, or however otherwise he may

be designated, and all from him down to the lowest servant of the prison, have one great duty—paramount and special—that of enforcing the discipline of the prison, and making the convict understand that he is amenable to every rule of the prison, as he was to every law of the State. But the convict must see and feel that the enforcement of the rules proceeds from no spirit of unkindness, and no desire for the gratification of a personal pique.

The enforcement of the laws of the prison is in no way incompatible with the fulfilment of the law of love. Driving the convict to the tread-wheel, one of the most cruel of all prison employments, may be done in a way to insure both obedience to rule and feeling for the ruled; and even the passing and throwing cannon balls, the most ridiculous of prison exercises, may be so enforced that the offender may escape the ridicule which the employment suggests.

The execution of every prison law, the infliction even of punishment for some violation of that law, may be conducted in a tone and temper that shall create in the sufferer respect for the law, and almost love for the administrator thereof.

The best disciplinary institution in the United States furnishes the example of a chief who never suffers even a slight offence to pass without "comment" and never suffers offence nor comment to move him from the quiet dignity that magnifies his office, and is sure to prevent a repetition of the offence that required visitation.

He who would present entirely the subject of Penology must not begin with the penitentiary. The subject is not limited to the infliction of the sentence of the Court upon one found guilty of the violation of the laws of the country. The law itself and its enactments, the motive of the bill and the bearing of the law must be considered.

In these times of easy access to legislative halls and of frequent changes of occupants, a legislator may manage to procure the passage of a bill, which owes its existence to some desire to promote individual interest, or to gratify

personal revenge, and enable the author to escape public accountability by withdrawing into former privacy, or insuring immunity to himself by a boldness that shows him capable of sustaining himself against popular outcry, and of doing more wrong.

There is another consideration which precedes the penitentiary, and that is the administration of the law. Few circumstances have contributed more to the increase of crime than the uncertainty and inequality of the decisions and instructions of courts and the verdicts of juries.

The observer of events, especially of acts and their consequences, which bring men within the operation of the penal law of the State, cannot close his eyes to the most obvious fact that the actions of the criminal courts are often spasmodic. There are times when murderer after murderer is allowed to escape the prescribed penalties of his offence upon some plea of morbid philanthropy, some loose decision of the bench, or generally some most unaccountable verdict of a jury; and, when this practical insult to justice has arrested some public feeling, and the impunity of crime tells upon many individuals, there is an outcry against the particular offence which negligent administration of the laws encouraged, and, forthwith, the other scale of the balance of justice rises, and suspicion and arrest are sufficient to ensure a verdict of guilty, and a season of Draconian sacrifice follows. A cycle of unprecedented crime and justice is fed with victims as if to appease an appetite sharpened by long abstinence.

Where this essay may first be read there may be a lack of instances to sustain this assertion, so true where it is written. The history of proceedings of criminal courts, scarcely a generation past, shows how arbitrary may be the verdict of juries, and how opposite the testimony and the declared law. The escape of a criminal, upon some morbid feeling of the jury, some qualm of conscience as to the verdict, is a powerful auxiliary to crime and an encouragement to the felon, by alluring him to count upon many chances of escaping the

vengeance of the law when he shall have exhausted his ingenuity in trying to escape the vigilance of the officer.

The danger of neglect or bias of the bench needs not to be considered. *Judex damnatur cum nocens absolvitur.*

All that has been here written has reference to the punishment and reformation of the violator of the law, and volumes might be written to illustrate and enforce the views here set forth. But is there no preventive? Must crime go on increasing with an increase of population and aggravated by pride that refuses labour, and augmented by the fluctuation of business that destroys the hope of success? Must society be always moved to associations, to national and international congresses, to treat of the construction of prison houses, and the best mode of punishing felony and of reforming the criminal, and no one ask whether something may not be done to lessen the necessity of prisons as well as to alleviate their miseries?

At the present time, more than ever before, we hear good school learning recommended as the great preventative of crime. "Where the school rises the prison loses its tenants." The school master and the prison warden are said to live in antagonism, and the success of the former is the defeat of the latter, yet careful inquiry at the cell door of the prisoner—fourteen years of that painful but instructive employment of time—have shown that learning has little or nothing to do with preventing or promoting crime, however it may influence the character of the act.

Send your children to what school you may, accompany their studies with the closest watchfulness and hasten their progress with all the stimulants of pride or of avarice, and you neither induce nor promote subsequent virtue. The more learning the more danger, unless that learning be influenced and sanctified by religion, by a sense of moral responsibilities, or accountability for moral deeds and for their consequences. I am not speaking of denominational distinction, but of a cultivated conscience, whether that conscience be the demon of Socrates or the inspired intelligence of St. Paul, which was to be void of offence. And I

repeat that, while of the lower order of crimes I may have found more unlettered than lettered criminals, I have found the former more amenable to gentle, moral dealing than the latter. I have found all more tractable than is generally supposed, and they have manifested more intelligence to submit to some privation for the sake of virtue than it is usual to credit them with. I suppose three-quarters of all convicts who are discharged from prison might be saved from future crimes.

The true preventive of crime, that which shall keep the young from the contemplation of unrighteous acts, and withhold them from the desire of pleasure or profit from unlawful pursuits, is a religious foundation of learning and a constant recognition of moral duties in every lesson that is imparted. And while we hear on all sides of parents making sacrifices of means and feelings to give to their offspring a good school education, and see the objects of their solicitude and sacrifice make use of this learning to facilitate and augment crime, we recognise the applicability of the words of the English poet :—

“ Train up your children in the way of righteousness,
And feed them with the bread of wholesome doctrine.”

IV.—THE PROPOSED GENERAL SCHOOL OF LAW.

By GEORGE STEGMANN GIBB.

THE course which the discussion regarding Lord Selborne's Bill for the establishment of a General School of Law has taken lately, is, we think, rather unfavourable to the complete success of the measure. There has been a great deal of discussion as to how far the Lord Chancellor is likely to give the Bill his support, and very little as to how far the Bill deserves that support. It is no doubt true that the Bill

cannot be passed into law, at least during the next Session of Parliament, without the Lord Chancellor's support, but it is also true that, in order to gain that support, it may be necessary to abandon some of the most vital and important provisions of the Bill. For, although the Lord Chancellor was friendly in criticizing, it by no means follows that he will be equally zealous in promoting the measure. Even if his personal views were entirely in its favour, it must not be forgotten that he is a member of a party which is adverse to change, and that his position makes it necessary for him to give weight to party considerations. There is a danger, under these circumstances, that too much may be conceded in the endeavour to meet opponents' views. Amendments have already been proposed which, as we shall endeavour to point out below, would, if adopted, render the whole effort for reform abortive.

We propose, therefore, before directing our attention to the Bill itself, to consider what are its main objects. They are chiefly two. First, it seeks to improve the meagre and unsatisfactory character of the educational facilities at present afforded to the students of either branch of the legal profession, and to devise some means of persuasion or compulsion by which guarantees may be obtained that the facilities offered will be taken advantage of by those for whom they are intended; and second, it proposes to do something towards healing the disunion which has crept into the profession, splitting it into two separate and somewhat antagonistic sections, the exclusive pretensions of each of which might be abated with equal advantage to themselves and to the public.

While, however, attempting to remedy these evils, the existence of which, in a greater or less degree, is denied by none, the measure seeks to do more. The function of true reform is not limited to correcting abuses; such an idea implies an utter stagnation of national life and mental effort. A wise measure of reform, or, as it might be more aptly termed, of progress, and this is especially true of all

matters relating to education, ought in part to create the want which it supplies. While using to the fullest extent the experience of the past, it should base its provisions, not only on what has been, but likewise on what can be, and should seek to make men continually strive to reach the highest point of excellence which a reasonable prescience can suggest. Lord Selborne's Bill, as we shall endeavour to show, does not fail to fulfil these conditions.

The history of this measure and of the agitation which led up to it, is so well known that we shall not repeat it here. There is one fact, however, of which we should like to remind our readers, and that is as to the persons to whom belongs the credit of having set the movement on foot. At first sight it appears somewhat remarkable, that the great men who, in the early part of this century, fought the battle of legal reform so bravely and successfully did not attempt to do anything, or at least very little, for legal education. So overlaid with abuses was the law itself, that they were no doubt right in selecting the most pressing evils as those to be first attacked, but, had the progress of reform stopped where they left it, all their labour would have been in vain. For of what avail are improvements in the law, if those to whom the administration of the law is committed are left in a state of ignorance and narrowness, which renders inevitable the introduction of fresh abuses? Those who belong to what is sometimes called the lower branch of the profession were the first to see this, and bestirred themselves to introduce a new and better system of legal education, with speedy, though partial success, so far as their own branch was concerned. The movement thus set on foot by attorneys soon became general in the profession, and resulted in the appointment of two Royal Commissions to consider the subject, who reported, the one in 1846 and the other in 1855. Subsequently to the Report of the Commission of 1846, the Benchers of the Inns of Court, who had been called upon to do something towards rescuing legal education from the state of lamentable decay into which,

according to the Report of the Commissioners, it had fallen, feeling that they were much too cumbrous and imperfectly constituted bodies to grapple with the work which had been set before them, formed eight of their number into a "Council of Legal Education." This step has been often used by the apologists of the Benchers to cover the multitude of their sins, and even to support a claim to the gratitude of the profession and the public for their efforts. We cannot look upon it in that light. On the contrary, it was a confession of inability to deal with the subject without some radical change in their constitution; and its value, either as a sign of the willingness, or as a testimony of the capacity, of the Benchers, by means of internal changes, to effect the requisite reforms, must depend upon the measure of success which resulted. That, it is well known, has been very small indeed; and, in fact, it was on account of the utterly delusive and unsatisfactory character of these pretended reforms, and of their marked failure, that the second Royal Commission, that of 1855, was appointed, the only result of whose Report, which was still more able, exhaustive, and decided than that of the first Commission, was to make the Benchers give another turn to their educational kaleidoscope, leaving, however, a complete and satisfactory settlement of the question as far off as ever. Then, in 1870, came the formation of the Legal Education Association. There were, in fact, three distinct stages in the progress of this question of legal education; the first is marked by the Report of the Commission of 1846, the second by the Report of the Commission of 1855, and the third by the formation of an organized agitation in the "Legal Education Association." In the first stage, little more was done than to ascertain and point out the exact magnitude of the evil. In the second stage, matters were advanced a step farther; the Inns of Court had given some indication of what they understood by reforming themselves, and the Commissioners plainly told them that what they had done was a mere mockery, and recommended the

adoption of a system of study and examination for the members of the bar, so thorough and satisfactory that it left little to be desired except its adoption in a permanent shape. But there they stopped; they paid no attention to the needs of solicitors, and the recognition of that omission is one of the chief characteristics of the third stage alluded to above.

Let us see, then, what the proposals of the Legal Education Association are. The sum and substance of these proposals is emphatically expressed by the Executive Committee, in one of their reports, in words that were quoted by Mr. Baron Amphlett when addressing the Association as its President in 1873, as enunciating one, he afterwards shows that he might have said all, of the cardinal principles of the Association, "that nothing short of a Central School of Law, not only open to students for both branches of the profession, but to the general public, and governed by a public and responsible body, would be acceptable as a complete and satisfactory settlement of the question."

Lord Selborne, in moving his resolutions in the House of Commons, on the 1st March 1872, respecting the Establishment of a Central School of Law, said, in regard to what might be called the most cardinal of the principles of the association, "This system should be comprehensive; there should be nothing narrow in it; nothing bringing forward with unnecessary and premature jealousy the distinction which, in after life and practice, may exist between those who may addict themselves to different branches of the legal profession. In the stage of studentship, the great object is to give the benefit of the best system of instruction which you can confer, and which they will accept, to every body who will take it, and it is as desirable for those who will afterwards be attorneys and solicitors as for those who will hereafter be barristers, that they should have the best opportunities of acquiring the utmost amount of the best possible knowledge."

The jealously guarded separation between barristers and

attorneys is matter rather of history than of principle or policy. Its origin and development can be traced with tolerable clearness. Although the early history of "men of the law" is somewhat obscure, two things are quite clear: the one, that the division of labour, which now exists in the profession, did not always exist, and the other that, long after the profession split itself into two sections, so far as duties were concerned, the education of the two sections was carried on in common. One element of confusion lies in the use of the word "attorney." When we first read of an "attorney" the word is used not to signify a lawyer at all, but simply some one who was permitted, by writ out of the Chancery, to appear in the stead of the defendant, *ad lucrandum vel perdendum*. Then it became not uncommon, during the 13th century, for pleaders or counsel to be constituted the "proxies or attorneys" of the parties to suits,* and hence the word "attornatus" came to be applied to lawyers or pleaders. The word "apprenticius," too, went through changes which are apt to lead us astray. Although it subsequently came to be used as a generic name for all counsel, it originally bore its natural meaning, and was confined to students. When, therefore, lawyers are spoken of as consisting of three classes, "servientes narratores" or serjeants, "attornati," and "apprenticii," it is probable that these names, when we first meet with them at any rate, merely marked three grades or steps of advancement in the legal profession. It is not very clear when this was altered, and the serjeants and "attornati," though both recruited from the ranks of the "apprenticii," became separate and distinct, and the duties of advocacy came to be exclusively performed by serjeants, or a lower grade of pleaders, and the duties of a lawyer, other than advocacy to be performed, exclusively, or even generally, by "attornati." Probably the distinction on both sides was of slow growth, and was not recognized as a distinction at first, except in practice. It had certainly not

* Pearce's Guide to the Inns of Court and Chancery, p. 17.

become an established and exclusive division before the middle of the fifteenth century.* After the division of labour became general it is easy to imagine that a certain jealousy would spring up between the two classes of lawyers. There would be constant watchfulness on the part of each that the other did not encroach upon acknowledged privileges, and there would, of course, be a border land, a number of functions which each section of the profession would seek to draw within the net of its own monopolizing privileges. This spirit of mutual encroachment and exclusion can be very clearly traced in the history of the Inns of Court and the Inns of Chancery. These Societies originally formed the component parts of a great legal university, the origin of which is generally attributed to the provisions in Magna Charta, fixing the Court of Common Pleas at Westminster. The court being made stationary, the lawyers, of course, settled near it; and, showing an example worthy of imitation by their descendants of the nineteenth century, their first care seems to have been to make provision for the teaching of the law. They appear to have seen, too, that the control of legal education should be in some central and official body, for they immediately began to monopolize the teaching. Before their establishment, there had been schools of law in the City, but, in the twenty-eighth year of the reign of Henry III., the authority of the king was obtained to put an end to these rival teaching bodies.

As our object is to show how and when the division of labour which separated lawyers into two classes took effect upon their education, we will not linger to trace, with any minuteness, the development and progress of the ancient prototype of Lord Selborne's School of Law. What we wish to insist upon is, that there was a Central School of Law, where lawyers were taught and examined before being allowed to practise. The subjects taught had perhaps a wider range than would now be thought expedient, for we do

* See "A Sketch of the Early History of Legal Practitioners and of the Inns of Court and Chancery." By Thomas Marshall, M.A. Goodall, Leeds, 1869.

not know that it is Lord Selborne's intention that there should be attached to the proposed School of Law what Sir John Fortescue says existed both in the Inns of Court and the Inns of Chancery, "a sort of academy or gymnasium fit for persons of their station where they learn singing and all kinds of music, dancing, and such other accomplishments and diversions, which are called revels, as are suitable to their quality, and such as are usually practised at Court."*

The regular and necessary course of training for a lawyer in those days was, that he should pass the junior stage of his studentship in an Inn of Chancery, and, when more advanced, become a member of an Inn of Court, where he completed his education. So long as lawyers were all of one kind, and the person united in himself the offices both of a counsel and of an attorney, there would not be much difficulty in enforcing an uniform course of training; but, when the division into barrister and attorney was effected, it is natural that those for whose duties the less advanced course of study obtained in the Inns of Chancery was a sufficient qualification, would begin to cease furnishing themselves with an education more complete and more expensive than they seemed to require, and to commence the practice of their profession without becoming a member of an Inn of Court. Those intending to become barristers, on the other hand, were likewise interested in curtailing the length of their period of studentship, and commenced to enter themselves as students of an Inn of Court before having received any preliminary training in an Inn of Chancery. It is easy to see how the effect of these irregular practices would gradually diminish the number of attorneys who were members of any of the Inns of Court, as well as the number of barristers who became members of an Inn of Chancery. What was in its origin an irregularity ultimately became an established custom, the result of course being that the Inns of Court were practically left to barristers, and the Inns of Chancery to attorneys, but without any practice or even thought of mutual exclusion. That was to

* Fortescue, *De Laud, Leg., Ang., Cap. 49.*

follow ; and the steps by which it was brought about are not difficult to trace.

There can be no doubt that the discontinuance of the habit of completing their education at an Inn of Court must have had an evil effect on attorneys. It was as true then as it is now, that it is by a high standard of learning, and by that alone, that the character of a learned profession is maintained, and not by any artificial safeguards of wealth or rank, and the invariable effect of lowering the standard of learning, or of allowing it to sink, is to sow the seeds of dishonesty, corruption, and innumerable and pestilent evils. We find, then, that this voluntary retrograde step on the part of attorneys was taken advantage of for the purpose of excluding them from the Inns of Court. The ground was, as it were, prepared by an order, relating to the Inner Temple, made in the year 1556, 3 & 4 Ph. & M. (23 May), "that henceforth no attorney or common solicitor be admitted into this House without the assent and agreement of this Parliament." Here we see the turn affairs were taking, the expression of a desire to obtain exclusive possession of the Inn for barristers, but as yet going no farther than the assertion of a right to exclude attorneys, if it should be thought desirable to do so. The next move was not long delayed. In 16 Eliz. (A.D. 1574), an order was made, applying to all the Inns of Court, "If any hereafter admitted in court practise as attorney or solicitor, they to be dismissed and expulsed out of their House thereupon, except the persons that shall be solicitors shall also use the exercises of learning and mootng in the House, and so be allowed by the Bench." As the attorneys, unfortunately, were not inclined to use the "exercises of learning," this order was no doubt effectual in preventing, for the future, attorneys from becoming members of the Inns of Court, but the chief point to be noted is, that although the idea of separation and exclusion was manifestly gaining strength, there is yet no trace of any objection, on principle, to the common education of barristers and attorneys. The next

step, however, is one easily taken ; a practice cannot exist long before reasons, more or less sound, will be invented to justify it. Accordingly, on the 7th November, 1614, forty years after the date of the last order, and when, therefore, its full effect would have been attained, and the attorneys who were, at the time when it was made, members of the Inns of Court, would have died out, another order was made crowning the edifice which had been built with such cautious but persistent design : " For that," it runs, " there ought to be preserved a difference between a counsellor-at-law, which is the principal person next unto serjeants and judges in administration of justice, and attourneys and solicitors, which are but ministerial persons and of an inferior nature ; therefore it is ordered that from henceforth no common attourney or Sollicitor shall be admitted of any of the four Houses of Court."

We thus see the causes and the development of the separation which Lord Selborne's Bill seeks to cure, so far at least as education is concerned. We do not mean to argue that because barristers and attorneys were formerly educated together, they should, for that reason alone, be so now. Such an argument would be as weak and puerile as that which points to the existence of a separate system of education as a valid reason why a common system should not be introduced. But we are at least entitled to summon the past to testify against the wisdom of the existing system, by showing that its origin was due to a decline of legal education, that its progress was fostered by self-seeking motives and retrograde unenlightened views, and that its final establishment was obtained by a position of aggressive antagonism being taken up by one branch of the profession. Surely, then, if we have now come to desire a better and more systematic education and to wish for more harmony between the two branches of the profession, our objects cannot be better gained than by reversing a policy which, in its origin, was the result of views the reverse of those which are now held.

It is scarcely necessary to advert to the once common notion that the dignity of the bar would be affected by intermixture in lecture rooms with solicitors. That feeling was very strong not long ago; the isolation of the two branches of the profession having bred, as it naturally would, positive dislike and rivalry between them. An amusing instance of the influence of the feeling above alluded to was shown in the examination of one of the witnesses before the Commission of 1846. Lord Westbury, though justifying his objection by no further reason than the famous one given to Dr. Fell, was content for its sake to forego all the advantages which would flow from a system by which all persons intending to follow a public, though not a strictly professional career, could have an opportunity of obtaining some legal instruction. He said, speaking of the proposed lectures to be given under the direction of the Inns of Court, "If these lectures were open to all, they would be open to attorneys and to the clerks of attorneys, and I confess I should object to that intermixture, and *on that ground* I have not proposed that they should be open to any but students for the Bar and barristers called to the Bar." His Scotch training, or it may be the different character of the man, kept Lord Brougham from sacrificing a reform to a sneer. When giving evidence before the same Commission, he was asked, "How would your lordship propose to deal with the professional education of solicitors; would you allow them to profit by the advantages held out to the higher branch of the profession?" and answered, "Decidedly; I would allow them to attend exactly the same classes with the other students." It is indeed extraordinary how the vindictive and contemptuous spirit apparent in Lord Westbury's answer should have ever existed. At no time have the two branches of the profession been recruited from different ranks of society. It has always been the most common thing in the world that, of two members of the same family, one should become a barrister and the other an attorney. There

are, of course, many exceptions to be found in both branches of the profession; and the existence and frequency of those exceptions is one of the most creditable facts in their history. Though a monopoly, the legal profession is not a monopoly of rank, or wealth, or influence, but, while open to influential mediocrity, it is equally open to obscure merit.

Now, although we are prepared to contend, that by showing that there is no reason why barristers and attorneys should not be educated together, we conclude the question in favour of common education, it may be well to consider a few of the substantial arguments on both sides. The chief if not the only arguments against mixed classes are contained in the following extract from the Report of the Commissioners of 1846:—"The Inn of Court has a jurisdiction of its own in harmony with the whole course of the proposed education, but the Solicitor who is without its pale would stand in an anomalous position as a mere extern listener. It must also be remembered that many of the lectures would scarcely be appropriate and special enough for his wants. . . . The same may be observed of the examinations."

As to the first objection, we confess that we cannot, to our own satisfaction, fully appreciate its meaning. But, if the figurative language employed merely mean, that because solicitors cannot, according to the then and now existing rules of the Inns of Court, be admitted as members of these privileged societies, they would therefore be unable to obtain any instruction from lectures delivered under the direction of these Societies, then the proposition amounts to this--that, admitting the proposed common education to be desirable, yet it cannot be carried into practice because the self-imposed rules of the Inns of Court do not provide for it. The proper answer to any such contention was given by Lord Selborne, in concluding his speech in the House of Commons, on moving the Resolutions respecting the proposed Central School of Law, when he reminded the House that its authority was paramount to that of the Inns of Court, and that, if they

did not choose voluntarily to acquiesce in approved measures of reform, they could be forced to do so. But the Inns themselves have since receded from the position taken up for them by the Commissioners, by admitting solicitors to the lectures set on foot by their latest scheme. And Lord Selborne's Bill most admirably meets any difficulty which might arise from the nature of the constitutions either of the Inns of Court or of the Incorporated Law Society, by leaving to these respective Societies their independence in all matters save in that of legal education, and by creating a new body, whose special and sole function will be to provide and regulate the new system of education, and who will be chosen so as to represent the views and interests of, and thus to bring the new arrangements into harmony with each of the different societies.

The next objection raised to mixed education is, that the lectures "would scarcely be appropriate and special enough for a solicitor's wants," and the same is said of the examinations. Now this raises the whole question of what a solicitor ought to know, and how he ought to be taught. We have not space to enter into a full discussion of this subject, but the approval with which we regard Lord Selborne's Bill rests so largely on our views with regard to this question of allowing attorneys to share in the proposed reforms, that we shall state a few of the reasons which lead us to dissent from the hesitating and qualified doubt of the Commissioners.

The idea that lectures appropriate to the wants of solicitors must be different from those required by barristers, rests on an entire misconception of the distinction between barristers and solicitors. That distinction is, it is well known, not universal. Though not peculiar to England, it does not exist either in the United States or in Canada. The principle on which alone it can be justified, if indeed it can be called a principle, is that of the expediency of a subdivision of labour. But the line of division, where the solicitor's duty ends and the barrister's begins, is a very vague one, at least in practice. It varies indefinitely according to the capacities

and habits of the solicitor, the wishes of the client, and innumerable circumstances, trivial and important, peculiar to each case. On one point only is there anything like a well defined distinction, and that is, that the duties of advocacy are, in the superior courts, performed by barristers. But, to be quite fair, we will not take that as the only distinction, but will admit that, in practice, whenever a case arises on which the law is the least doubtful, it is submitted to a barrister for his opinion. Now there are several reasons for this. No doubt one of them is, that a barrister, having become, by reason of the course of his study and practice, more learned in legal book lore than a solicitor, is able more easily and more speedily to anticipate what a judicial decision on the case in question would be. But not a few cases are sent to counsel for advice, for no other reason than that, under the present pernicious system of charging, it pays a solicitor better to do so; he has no trouble, and, in addition to the charges which he would have obtained if he had done the work himself, which are not abated by one shilling, he can charge for all the additional attendances on counsel, and for extra copies. Of course the client is correspondingly the loser. But that is not all; for not only does the system of filtering the law through two agents, where one would suffice, mulct the client in more costs, it deprives him at the same time of any redress if the advice given should turn out to be grossly incorrect and foolish.

There is one other cause of cases being sent to counsel for advice which operates very widely. The law of England is an undigested and immethodical mass. In nine cases out of ten the only difference between a lawyer and a layman is, not that the former knows the law and can tell it off-hand, but that he knows where to find it. Now few solicitors have good libraries of reports of decided cases, and as the great majority of cases that arise depend for their decision on case-law, the solicitor has not at hand the means of giving an opinion. We think it will be found that solicitors in small practice, with few or no books, send a much larger

proportion of cases to counsel for advice, than solicitors in large practice with good libraries. Of course we are not speaking now of difficult and complicated cases, which, even if there were no recognized distinction at all between barristers and solicitors, would generally be sent for advice to men with special aptitudes, but of the thousand and one cases which arise in daily practice, and on which, under a proper system, the solicitor should need no advice at all.

Our contention is that, if solicitors were properly educated, they would not only be more competent to do what is certainly within the scope of their duties, to form and to give an opinion on legal questions, but they would also, to the great advantage of the public, be more ready to look upon it as their duty to do so, and to make provision accordingly. It may be said that the public would suffer more than they do at present from rash opinions given by incompetent persons. And we are quite ready to admit that, so long as the education of solicitors is pinched and starved as it now is, the public must put up with the expense of having two agents in small matters as well as great, and agents too, who have not even so much as a divided responsibility. But if the education of solicitors were properly provided for, the interests of their clients, and the higher interests of the law, would be as safe in their keeping as they now are in the hands of barristers. Pressure of other and incompatible duties is often given as a conclusive reason why solicitors can never either acquire, or keep up, an extensive knowledge of the principles of law. We think, however, that the want of proper training has more to answer for in that respect than the want of time.

We are not sure that we can quote 'the sanction of the Legal Education Association for the tendency, at least, of these views. Many members of it have repeatedly and expressly disclaimed any wish to alter, either directly or indirectly, the present duties performed by barristers and attorneys. Neither are we at present advocating any such change. We simply wish to see duties that are admittedly

within the province of attorneys more faithfully performed by them; and that cannot and will not be done, till some improvement is made in the system of teaching them the principles of law.

But, even if the common practice of solicitors at the present day is considered, the teaching supplied is wholly inadequate to their wants. It is the greatest mistake in the world to suppose that the duties of a solicitor are more those of a business man than of a lawyer. In London at any rate not a day passes without a solicitor, if he is in fair practice, being called upon to perform duties which require the possession of a considerable store of legal learning, and the exercise of the highest faculties of reason and judgment. True, he has to combine knowledge of business with knowledge of law, but that is a reason, not for less, but for more careful training. Unless he has received a systematic and liberal education, he will be unable to meet the demands upon him, which, it must be remembered, are usually of a more sudden nature, and call for more prompt decision, than is generally the case with barristers.

We have already alluded to certain suggested changes or modifications of the scheme embodied in Lord Selborne's Bill, which would, in our view, if adopted, go to defeat the whole of the improvement expected to result from it. The most important, and, to our thinking, fatal of these suggested amendments, is one which comes from professed friends of the measure, but whom, if the Lord Chancellor were not amongst the number, we should prefer honestly and bluntly to call opponents. These friendly critics are quite prepared to allow the measure to become law, if the functions of the new School of Law are restricted to those of a mere examining body. Now, unless every one of the arguments, by which we have endeavoured to show that a reform such as that proposed by Lord Selborne is needed, are irrelevant and vain, it will be seen that what is wanted is, not a new examining body, but a new teaching body. If the office of the new school were limited to looking after the

examination of those seeking admission to the bar, or to the roll of solicitors, we cannot see why that object could not be gained by much simpler machinery than that proposed by the Bill, or, in fact, why there should be any change in the present system. The only effect of creating the new body would be to give a few solicitors a voice in regulating the examination of barristers, and vice versa. And then they would only have to give an empty sanction to the existing arrangements and examinations; for we do not believe that the present system of teaching would admit of any more tension on the examinations than now exists. The present system of examination both for barristers and solicitors is a fair one; its chief defect being that there is no guarantee for its permanence or expansion; but that defect is rather a cause of future failure, than of present imperfection.

The only use of examinations is to test the efficiency of previous training. Of themselves they are direct evils. They encourage a system of cram, and bad habits of study; as Wolf said "*Perverse studet qui examinibus studet.*" We are too apt in England to put excessive trust in examinations, and to think, that if a student can pass a fair examination at the end of a few years, he has therefore got a good training during those years, and has made a good use of it. Even where the means of obtaining a good training exist, as they do not in this matter of legal education, that is quite an unsafe conclusion. In this respect the Germans hold far more correct views than we do. This is pointed out by an able writer, one of the most competent authorities that could be quoted, in a recent book. "That a boy," he writes, "should have been for a certain number of years under good training is what, in Prussia, the State wants to secure; and it uses the examination test to help it to secure this. We leave his training to take its chance, and we put the examination test to a use for which it is quite inadequate to try and make up for our neglect." * *

* "Higher Schools and Universities in Germany," by Matthew Arnold, D.C.L. 2nd Edition. Macmillan and Co. 1874.

But, in addition to these objections to making the new School of Law a mere examining body, there is another, still more fatal, viz., that, by doing so, the great object of assimilation in education of barristers and attorneys would be entirely lost. Even if they had to undergo the same examinations, which is no part of Lord Selborne's scheme, still they would be left to pick up their knowledge of law in the present haphazard and eccentric way, and there would be none of that joint effort and harmonious relationship, the introduction of which would be one of the most valuable effects of the new School.

Another part of the scheme which we consider of great importance is, that the proposed School should be central, and conducted on a large and liberal scale. Of course, financially, that is the only practicable scheme, if the School is to be self-supporting. But on other grounds it is desirable. We cannot but think that Lord Coleridge, when he said that "to teach English law, understood in the ordinary sense, by means of lectures, is a pure delusion," giving as a reason for his opinion that the law was unscientific in form, he just reversed the proper way of looking at the subject. Our view is, and here we are supported, not only by the authority of almost every eminent man who has spoken or written on the subject, but also by the experience of other countries, that the unscientific character of English law is due, not to any inherent defect in the law itself, which renders it impossible to reduce it to a system, but simply to the want of scientific and systematic teaching. The fact that Blackstone's Commentaries, a work which has always been esteemed as one of the best and most authoritative books on English law, was the product of teaching by lectures, and that the same may be said of many of the best known books of other countries, such as Kent's and Story's works in America, and Von Savigny's in Germany, is of itself sufficient, as Lord Selborne pointed out, to refute Lord Coleridge's opinion.

If, then, teaching by lectures is the best way of teaching English law, we must obtain a supply of lectures of the best quality possible. This can only be done by establishing a central School, which, on account of the emoluments, position, and other advantages that it will be able to offer, will attract to itself competent lecturers. The difficulty of obtaining good teachers, and the difficulty of becoming a good teacher, are more recognized now than used to be the case. Teaching has come to be looked upon as both a science and an art, and a very difficult art too; one that requires a life's devotion to learn it. Before the teaching of law can be effectually and permanently improved, a new body of teachers must spring up, men who intend to devote themselves wholly to the teaching, and not to the practice, of law, and who will thus form a class of academical lawyers; and in order to obtain men of sufficient talent for these objects it is essential to offer the advantages which a Central School of Law could alone afford. At present the various lecturers are often able men, but, those of them who are so, merely take to teaching as a means of earning a livelihood until they can get into practice. No man of ability would be content to look forward to his life's success being limited to a professorship in the Inns of Court, or a lectureship at the Incorporated Law Society.

We have dwelt at such length on what we conceive to be the objects of Lord Selborne's Bill, and the abuses it is intended to correct, that we have no space left to describe with any fulness the machinery by which the Bill proposes to effect its ends. It creates an entirely new body, with no official connection either with the Inns of Court or with the Incorporated Law Society, but having a connection by representation with each of them. Hence the Bill, and this we think is its principal weakness, provides for legal education without reference to the funds which are held by the four Inns of Court, in trust for that very object; in the case of two of them on an express trust. The Bill originally

contained a scheme for the reform of the constitutions of the Inns of court, but, out of eagerness to secure the passing of the School of Law part of the Bill, all the clauses relating to the reform of the Inns of Court were embodied in a separate Bill. Now there is a danger of going too fast. The importance of passing the School of Law Bill without delay is no doubt great, but, if the effect of doing so were to render it impossible afterwards to obtain any reform of the Inns of Court, or the application of any of their funds for the purposes for which they are held, we think that the saving of a few years' delay would be dearly bought.

The Senate of the new School of Law is to consist of thirty-eight members, eight of these being *ex officio* members, viz. the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, Her Majesty's Attorney General, Her Majesty's Solicitor General, and the president and ex-president for the time being of the Incorporated Law Society; ten being nominated by the Crown; four by the Benchers of the four Inns of Court; four by the Council of the Incorporated Law Society; and of the remaining twelve, six are to be elected by the barristers, and six by the solicitors, who are members of the General School of Law; barristers electing barristers, and solicitors, solicitors. Thus equal representation on the Senate will be secured to both branches of the profession, and the members elected will be fairly representative of the general body of the profession. The solicitors will be better off than the barristers in that respect, because the members elected by the council of the Incorporated Law Society will be delegates of delegates, and thus the control of their election will ultimately rest with the general body of solicitors, which will not be the case with those members elected by the benchers, who are not a representative body, either in constitution or feeling. On the other hand some solicitors are not quite fairly dealt with. It is apparently assumed that the Incorporated Law

Society is on the same footing as the Inns of Court so far as membership is concerned. That is not so. Admission to the bar lies through an Inn of Court exclusively; but there are numerous solicitors who are not members of the Incorporated Law Society. This requires amendment; and the amendment which we should like to see introduced would be, one that would broaden the foundation of the scheme, and strengthen the guarantees for its vigorous working, by giving the election of all the ten barristers, and the ten solicitors, who are to be members of the Senate, to the general body of each branch of the profession, thus allowing the Benchers of the Inns of Court, and the council of the Incorporated Law Society, the same amount of representation as other individual members of the profession and no more.

The teaching part of the scheme is provided for by the 14th section of the Bill, which gives the Senate power to establish professorships, and to regulate the course of instruction. The 16th and 17th sections provide that no person shall be admitted to practice as a barrister or solicitor unless he has obtained from the General School of Law a certificate of proficiency in such subjects as shall be required under the provisions of the Act; and this general enactment is qualified by the 20th section, which enables the Senate to make regulations, accepting degrees of other Universities as equivalent to the above mentioned certificates.

The mode in which the subjects of examination are to be settled is rather cumbrous. The examinations for the bar are to be settled by a majority of the Senate, subject to the concurrence of a majority of the barrister members present, there being, in the case of a difference of opinion between the two majorities, a right of appeal to Her Majesty as Visitor, who shall have power to refer the appeal to such of the Judges (not being members of the Senate) as Her Majesty shall think fit. The examinations to be imposed upon solicitors are to be settled in a similar manner.

Although there are of course several points of detail which, after a full discussion in Parliament, may be altered, and probably improved, we hope that all the main principles embodied in the Bill will be retained in their integrity. The result, we confidently trust, will be that the legal profession in England will, in the future, be still more deserving of the confidence and respect of the nation than it has been in the past, and that to those who, by assiduous devotion, may render themselves worthy of the destiny, justice may yet reveal many more of Her higher truths and deeper mysteries, for the guidance, under the blessing of Divine Providence, of our own and other nations.

CORRESPONDENCE.

INTESTATE SUCCESSION.—The author of the paper on this subject, which appears in our September number, points out a mistake he made, and which he discovered through a similar point arising in practice only on the very day our magazine was published. On page 802 he says: "Under the present system, to prove descent of such a near relative as a nephew from an uncle it is necessary to show the marriage of the nephew's grandfather, and, if not described in the register as a bachelor, that he had not had a son by a former wife." Assuming, as the author did, the uncle to have been the purchaser, and therefore the person from whom the descent was to be traced, he was wrong in saying that it was necessary to shew that the grandfather had not had a son by a former wife. The uncle and the nephew, if sprung from the same marriage of the grandfather, would be of the whole blood to one another, while a descendant of a former marriage would be of the half blood only to

both, and therefore his claim would be postponed. The author adds that the case he met with in practice well illustrates the trouble, expense, and inconvenience of the present system. To show title to a property by no means large he must have gone back to a first marriage which took place more than 150 years since. However, from a second marriage both the purchaser and another claimant derived descent, and therefore his client had no claim.

BOOK REVIEWS.

WILKES, SHERIDAN, FOX; THE OPPOSITION UNDER GEORGE THE THIRD. By W. F. RAE. (London: W. Isbister and Co. 1874.) Contests between the Houses of Parliament and the Judges are not likely to be as prevalent in the time to come as disputes between the Bench and members of the Bar, particularly with reference to the law of libel and those extra-forensic utterances which may appear to be breaches of the privileges which the bench claim by prescription. Mr. Rae's work, however, will be found interesting not only to the politician, but also to the constitutional jurist, in case any great question affecting the privileges either of the Commons or the Bench comes again to be publicly discussed. The law of general warrants, indeed, is now settled, so are most of the points that formerly gave trouble respecting the privileges of the Commons; nor is the recent transference of jurisdiction to the judges in respect to contested elections likely to be soon revoked. Nevertheless, constitutional doctrine is so apt to be brought into question that a compendious work like that of Mr. Rae, treating, as it does, of so distinguished a tripod of eloquent statesmen, will be found useful to the practical jurist as well as to those who desire correct information respecting the political career and opinions of Wilkes, Sheridan, and Fox. Of the many histories and memoirs relating to the period here treated of, the work under notice is not the least interesting or instructive. Mr. Rae, who is already favour-

ably known as the translator of *M. Taine's Notes on England*, has imparted novelty to several old subjects by the excellence of his style, as well as by his judgment, sagacity, and general powers of exposition. His anecdotes, criticisms of character, and sketches of party, will vie with those in that ideal biography, *Moore's Life of Sheridan*, while the greater width of his platform has permitted him to indulge in more freedom of movement than was open to Moore. The frequent references to authorities show that the author is a conscientious historian. He has performed his task well, and it is to be hoped that the present work is only the prelude of more good things to come. We shall have occasion to refer to this book in the series of articles about to appear on the Law of Libel.

THE LICENSING ACTS, 1828, 1869, and 1872-1874, containing the Law of the Sale of Liquors by Retail and the Management of Licensed Houses, with Notes to the Acts, a Summary of the Law and an Appendix of Forms. Second edition. By J. M. Lely and W. D. I. Foulkes, Barristers-at-law. (London: Henry Sweet, 3, Chancery Lane. 1874.)—The public interest which has attached itself to the only measure of any importance passed during the last Session of Parliament may account for the large number of books which have already appeared purporting to explain the Licensing Act, 1874. The piecemeal and contradictory enactments, and the endeavours made by our Legislature to shift responsibility on to others, has rendered the work of writing a clear and concise treatise especially difficult. It is, therefore, no small praise when we say, that a careful perusal of the work before us, will give the general reader an idea of the general purport and scope of existing laws, while the index of cases, and the appendix of forms will be found most valuable to the legal practitioner. A History of the Law, which prefaces the book, together with the summary and table of offences, have been arranged with a view to speedy reference. The Licensing Acts have been divided into three parts. 1. The Licensing Act of 1828 and the Amending Act. 2. The Wine and Beer House Act, 1869, and the Acts which it recites, the subsidiary Acts being interpolated in their appropriate places. 3. The Licensing Act, 1872, with interpolations of the Acts of 1874. The marginal notes of the Queen's printers, have been re-written, and though

this may have some advantages, we much question the wisdom of omitting them altogether.

Special reference is made to the Acts in force in the Metropolis, and the rules of the Middlesex Sessions for the Licensing Committee have been printed by way of sample. With regard to these last we would only say, they suggest to our mind that, when once the much desired codification of the Licensing laws has been decided upon, it would be very desirable that the draft bill should be produced under the direction of a Select Committee of practical Magistrates. At present, points which would occur to the most unobservant of practical men, are forgotten. Take, for example, the cumulative punishment for drunkenness, 10s. on the first conviction, 20s. on the second, and on a subsequent conviction within twelve months, £2, with hard labour in default. This provision of the law, though much to be praised for its intention in adopting its cumulative system, is practically inoperative, as though the second conviction may take place at the same court, the first conviction must be returned to the Clerk of the Peace, from whom a copy must be obtained to be produced before the magistrate, by the constable who was present on the first occasion. This is obviously a roundabout course, which might have been prevented by a few words, making each magistrate's court, a court of record for its own purposes. Where, as in the metropolis, scores of drunkards are daily convicted, and the staff of clerks is small, hundreds of offenders escape their due punishment, because the convictions are not returned. Many other similar matters we might easily point out, but they will readily occur to those who peruse Messrs. Lely and Foulkes little work, which has been carefully collated, and which we feel certain will take its place by the side of many productions of more known authors.

APPOINTMENTS.

Henry Longley, Esq., has been appointed the third Charity Commissioner for England and Wales; and R. A. Fisher, Esq., has been appointed Judge of the Bristol County Court.

THE LAW MAGAZINE AND REVIEW.

No. XI.—VOL. III.—NOVEMBER, 1874.

I.—ADDRESS ON JURISPRUDENCE AND AMENDMENT OF THE LAW.*

By the Right Hon. LORD MONCREIFF, Lord Justice Clerk
of Scotland.

THERE are two points of view from which Jurisprudence is generally regarded. One, that from within, whence she appears to the priests of the sacred temple of justice, who venerate even her most trivial rites, and guard her mysteries from the profane. That is the professional aspect of the science. The reverse of the picture is the appearance she presents to the unwilling votaries who are forced to do homage at her shrine—to whom she not unfrequently seems to be arrayed in motley robes, addressed in an unintelligible jargon—issuing incoherent mandates, and making little but a lottery of strife.

In discharging the duty you have imposed on me to-day I shall not represent either class. On the occasion of this Congress, which I regard as a kind of privileged festivity, at which solemnity is entitled to relax, and authority must submit to be treated with familiarity, I feel inclined to avail myself of my temporary freedom, and in a few desultory remarks to bring some of the rescripts of the law to the test of general analysis and of practical utility; to inquire

* Delivered as President of the Jurisprudence Department at the recent Social Science Congress, Glasgow.

how far, apart from technical rules of art, jurisprudence with us succeeds or fails when it enters the domain of ordinary life, and to point out some general principles by which we ought to be guided in our efforts for the amendment of the law. If, in the views I am about to suggest, I shall seem to shake the time-honoured branches of the sacred oak too rudely, or to do violence to the reverence due to old tradition, I have only to claim the short-lived privilege of the position which, by your favour, I occupy, and to protest that I do not intend to hold myself committed at any time, or in any way, to any of the speculations of this passing hour.

Although it rests on some broad principles, which are true at times, and under all conditions, yet apart from its operation on ordinary life, law has no empire. It is a science in so far as it beats in unison with the pulses of society, otherwise it is only a name. But within that sphere how great and varied are its aspects. Stripped of its external trappings, its technical phraseology, and its rules of art, so uncouth and distasteful to the public, and so dear to the more intense of its votaries, what pursuit in the whole range of intellectual labour is so full of the very essence of romance? Poetry and fiction aim only at the production of counterfeits—artistic imitations of those things which are the lawyer's stock-in-trade. The poet and the novelist deal with shadows only; he alone is conversant with the substance. The pathos and sublime of human life meet him every day. Fiction may be strange, but the lawyers finds facts stranger still. The emotions which stir the heart, the objects which prompt to action, the impulses of hope or fear, a joy or grief, or love or hate, all comes to the lawyer at last. He aids at every turn of Fortune's wheel, although sometimes but scantily thanked when the turn is served.

If, then, the study and practice of the law be dry and dusty, as is the popular impression, it is not because of the absence, but of the constant presence, of the elements of sentiment and human interest. The lawyer cannot stop to

cull the flowers in his path, for his objects are too real and too important to be the sport of imagination, and life is too short and time too precious to admit of his dallying by the way. But the exercise of our profession need not on that account, nor does it, blunt the fancy or harden the heart.

But my present object is not to exalt the merits of our guild, but to use these characteristics of law for a purpose more cognate to the objects of our present meeting. Law indeed is a miniature and compendium of life; and it ought to represent, as it professes to do, life as it is—not life as it has been, or as we may hope it may be, but the busy, earnest throbbing of the great arteries of a living community. But between the reponses of the oracle, and those it ought to give forth, the chasm may be great. For what avails it how logical, how symmetrical, how philosophical may be the system we have to administer, built by the learning of more than twenty centuries, if it be not made to fit the emergencies of the day and the hour?

Thus in the great ocean of jurisprudence we have two contrary currents—administration and legislation—one setting in to the past, the other to the future. For those who administer the law, it is immutable. That which has been is that which shall be, and should be. The perfection of the science—which never can be perfect until mankind is so, and then it might be dispensed with—is, that its precepts should ever continue as they have been; and the judge is condemned if the ancient landmarks are removed. When new occasions arise the old occasions must be invoked to solve them, and the old maxims and old formularies must be sought for at the fountain-head.

But while law in its own eyes is immutable, Time, the devourer of all things, even of Law, changes those objects for which alone law exists, silently abrading surfaces, effacing features, raising land here, submerging it there, until the end and purpose which the law was made to serve has disappeared altogether, or is so altered in its incidents and its surroundings as perhaps to invert the effect of its provi-

sions. This is a process in constant and daily operation, and one which the administration of the law is powerless to prevent or provide for. It is a process also which lawyers are slow, and perhaps unwilling, to see. It is hard enough to learn the law as it is, without being obliged to look beyond its confines, and to note how far it squares with the times. So an aggrieved community wait until the current of legislation sets in towards the future, and, taking warning by the past, provides for increased equity and security.

But legislation limps with a very tardy foot. The dull ear of the goddess must be long invoked, and hecatombs of injured suitors must be sacrificed on her altar before she relents and redresses. The grievance must be great and general: in other words, a considerable number of people must have suffered injustice before others shall be protected in time to come. Thus, while the country watches at the gates of the Legislature until the tale of suffering shall be complete, there is always a tendency on the part of the administrators of the law to make the new complication fit the old category. So it would almost seem in some instances that, as social relations and customs change, ingenious subtleties and devices are resorted to, to enable courts to apply rules which were meant for one purpose to another for which they were not meant, and to use them to solve combinations of fact of which the makers of the law never dreamed.

But when the ingenuity of lawyers and courts of justice has effectually surmounted by subtle analogy the difficulties of a case unprovided for, forthwith arise suckers and shoots innumerable from this new root, the original subtlety being in its turn adopted as a principle from which new deductions are to be made, until the luxuriant foliage entirely obscures the ancient stems, and we wander in impenetrable thickets.

The true principle on which this inevitable tendency of juridical systems ought to be counteracted is by bringing the law as it stands to the test of public utility, and inquiring how far, in the existing state of social and private

interest, it is calculated to promote justice in the average or greater number of instances in which it is likely to be applied. For a law may have been admirable, or indeed essential to the protection of private life, when it was made, and yet, as I have said, productive of nothing but injustice now. The question always ought to be, whether the evil it was intended to prevent, or the benefit it was intended to confer, is sufficiently general, important, frequent, or universal, to compensate for what may be sacrificed. This may be so at one time; at another the reverse may be true. The evil which was dreaded may have become a thing of the past. That which was surrendered to avert it may have increased tenfold in magnitude and importance.

Herein lies one great hindrance to the intelligent amendment of the law. However manifest the incongruity may be, however heavy the counterpoise of the opposite scale, courts of law must hold the balance blindly, and add the weight of authority and tradition to bring the lighter to prevail. Nay, I should not be candid were I not to say, that the necessity in the actual administration of the law of shutting out considerations of expediency or general utility, has a tendency to induce practical oblivion of this element, or a very narrow or partial appreciation of it. Thus when any alteration of an existing law is suggested, it is sure to be met by reference to possible cases in which the change would be inconvenient and unjust, and the critic thinks that his object will be attained should he succeed in demonstrating that this would be the result. But nothing can be more shallow or inconclusive. Every law is essentially inconvenient and unjust; that is, in some possible phase of its operation. The question for a philosophical jurist is, which state of the law will prove the most beneficial in the greatest number of cases; and that question once solved, possible instances of hardship are mere nightmares, which an enlightened legislator must entirely disregard.

Thus the evils which become gradually encrusted on any system of law, and which it is the object of the amendment

of the law to remove, arise mainly from the exaggeration of elements sound in themselves, but which, either from original defect or through change in the outward condition of the community, have lost their true proportions, and impair the symmetry, or impede the movements of the mechanism. Some of these I propose shortly to illustrate.

It is too late in the day in this country at least for even the most sanguine of juridical reformers to attempt to construct from essential principles a new system of jurisprudence, or, as Bentham did with great acumen and power, to deduce a new code from abstract views of general utility. For a system of laws is of all things the most practical. It penetrates and percolates through all the interstices and crevices of the social community, and becomes so incorporated with its vital essence as to render severance impossible. Even the least defensible and most questionable laws are not unfrequently so bound round the fabric of society that they cannot with wisdom or safety be removed. Still, in the pursuit in which we are now engaged, it must always be useful to revert to the object which the law was originally intended to attain, and to test it, as far as we can, by sound and philosophical views of its practical operation.

The illustrations which I propose to suggest of this gradual but incessant process of change may not be the most striking, and have no pretensions to philosophic arrangement; but they will, at least, bring clearly out the general principles to be kept in view in every amendment of the law.

Many laws were originally framed, not merely to secure special interests, but to guard against special dangers, and in compliance with prevalent apprehensions. Take, for example, the fear of civil despotism and oppression—a noble element in any system of jurisprudence, and one eminently characteristic of the law of England. In that respect the law of England stands pre-eminent. Whatever the philosophic jurist may say of the irregular but magnificent jurisprudence of the sister country, this element of political and personal freedom is a jewel in its crown which, to the patriot

and philanthropist, is beyond all price. Freedom, first of all, is the axiom on which the fabric has been built. Freedom, personal and political, is the basis on which all the superstructure rests. It is impossible to say how much this country, or, indeed, the civilised world, has been indebted to the tenacity with which the fathers of English jurisprudence clung to this sacred principle, or the jealousy with which they guarded it. She has paid some price for it, as I shall show, but far within its inestimable value. It pervades the whole system—from whatever quarter oppression was feared—crown, nobility, church; none were to lord it over the liberties of England. Hence the Habeas Corpus—to protect the subject's personal freedom; the Coroner's Inquest—that murder might not go unpunished; the Grand Jury—that the innocent might not be prosecuted; the unanimity of Juries—to avert unjust conviction; and private prosecution, lest the lieges should be sacrificed to arbitrary and tyrannical measures on the part of officers of the Crown.

This, as I have said, is the crowning story of English jurisprudence in times past, fraught with unspeakable benefits to the people, far above what the most philosophical system could have conferred on them, and distinguishing her nobly from the nations of the Continent, and I fear, also, in some measure, from ourselves. Yet it is to our credit that the first judicial declaration, that a slave became free when he touched British soil, is, I believe, to be found in the records of our own Courts. But "the dread sound is past." Our liberties are secure. None of the ancient fears can possess or distrust us now. Is it not possible that some of the ancient safe-guards may sacrifice too much to apprehensions which are now matters of history? Some may think that a Grand Jury has too much resemblance to trying a man in his absence; that a Coroner's inquest may shield instead of convicting the guilty, and is a needless and painful ordeal when no guilt has been incurred; and that the necessity for unanimity in juries imperils the course of justice, and affords delinquents too easy a chance of escape. These are ques-

tions on which I express no opinion, not being sufficiently conversant with the details on which alone a sound opinion can be formed. But they are worthy of consideration in such an Association as this, and one of them, I believe, will be the subject of discussion in this section. But the absence of a public prosecutor in the criminal jurisprudence of England affords, I think, a good illustration of the sacrifice of present interest to past and extinct apprehensions. I am not unaware of, nor insensible to, the practical difficulties which long usage and inveterate tradition have woven round the solution of this question; but surely that state of the law cannot square with any canon of justice which adds to the injury inflicted the obligation on the person injured of bringing the culprit to the bar. In this respect, I apprehend, England stands entirely alone in civilised Europe; but I cannot look on her solitude now as a distinction, although the history of public prosecutions two centuries ago, in other nations, largely explains and justifies her former jealousy. Parliamentary responsibility and public opinion have been found, in our narrower sphere, ample security against possible abuse of such powers, and a well matured measure, having for its object to place on the public the duty which properly belongs to it of bringing criminals to justice, would be hailed in England as a relief and a benefit too long delayed.

But the one great sacrifice which the jurisprudence of England has laid on the altar of liberty is of a much larger and wider description. She renounced and disclaimed the authority of the Roman law, and by consequence the authority of all the continental systems built on that stable foundation. It was the law of despotism—that was enough. Its illustrations dealt with men and women as chattels, articles which might be the subject of mercantile transactions which might be sold or bequeathed. That could be, in the judgment of the founders of England jurisprudence, no law for the free soil of England; and so, without any extraneous aid, renouncing participation in a sympathy with the jurists

of other nations, the labours of many generations of great and fearless men have built up a legal fabric out of materials found on English ground alone; rude at first, but massive and permanent, and now closely welded into harmony by the ability of her Courts, and the transactions of the greatest commercial nation in the world. Yet the result attained has been reached at no small sacrifice. The isolation of the law of England among European systems is a disadvantage; the entire singularity of the language it speaks, of the axioms it acknowledges, of the paths which it travels, unquestionably fetters and limits its range. The results arrived at, I admit, are not materially different from those to which the old Roman road would lead; but there are so many ingenious and painful divergencies made in order to avoid the beaten track, as to puzzle a cosmopolitan jurist to comprehend how he and his English friend ever reached the same terminus together. With all the unfeigned respect and admiration which I feel for the law of England, in some respects not lessened but heightened by the bold independence and originality of its course, I cannot consider it as anything but a misfortune that her lawyers should deliberately cut themselves adrift from the stores of the most learned men of the most civilised nations in the world, and from results deduced on the most enlarged and philosophic views of the varied and possible relations of man to man. However able their jurists and however distinguished their judges, they could not fail to reap benefit by being brought into contact with minds not less able, and with the systematic exposition of legal principle harmonised through the wide experience of many generations.

I speak on this question as a Scotch lawyer, remembering that I speak in the presence of English lawyers. Our Scottish system, apart from what it has borrowed from England, is simply a branch of the great European family. It has little which is indigenous. Principles and phraseology which sound strange in English ears would have been quite familiar in those of Voet, or Pothier, or Savigny. If

the question were of the assimilation of our law to that of France, or Germany, or Italy, the task would be easy. It is true that we in Scotland feel most the inconvenience of the special and peculiar system which prevails the other side of the Tweed, and great as is my desire to see the two systems assimilated, I only see one course by which that end might be to some extent accomplished, and it is one which to my mind has other reasons to recommend it.

Many years ago I sat as a member of the Statute Law Commission, the object of which was partly to provide for the abrogation of absolute statutes, and partly to see whether those which were in full operation could be consolidated by new enactment. The Commission bore some fruit as regarded the first of these; but it had not gone far before I became persuaded that the second was substantially impracticable. Statutes which have been long the subject of judicial interpretation often become deflected from the original and primary meaning of their words, a result which it may be equally impossible to express in a new statute, either by the old words or by new ones. There is only one remedy for the voluminous obscurity of the Statute Book, although, as yet, lawyers are unwilling to allow or adopt it—I mean codification, a compendious statement of legal results, without regard to the steps by which they are reached.

I have no idea that we shall ever see so gigantic a work undertaken as a Code of the Laws of these Kingdoms. A Code, or a Digest, is the work of an Arbitrary Government. How a Bill framed for this object would ever get through Committee in the House of Commons it is difficult to see. We should not, I think, attempt to commence on so ambitious a scale. But I see no reason why certain portions of the law might not be subjected to that process. Take, for instance, the department of Mercantile Law. The 'law of bills of exchange, of insurance, of sale, and other more common contracts, might, without much difficulty, be separately codified; and in the course of that process it

would be open to adopt what seemed the most desirable provisions of either system, or of any system. Lawyers are apt to exaggerate the importance of what is termed legal principle. In many of the most controverted questions it is of little moment to persons who contract which way they are solved, provided they know how they are to be solved before they contract. I see in this direction, and this direction only, a way to extricate ourselves from the anomaly, a most inconvenient and serious one, especially in the smaller country, of having two systems of law applicable to the same mercantile community. I believe all that is needed for this work is a serious and practical commencement, and, if I may take the liberty of making the suggestion, I know of no work more suited to this Association for the amendment of the law than the preparation of a specimen Code on one or other of the subjects I have indicated. I should have more hope from the voluntary effort of a committee of this Society than from any commission which could be appointed. The specimens might never become law, but it would show law makers how it might be done. Doubtless lawyers would mourn over the loss of those cherished refinements by which their results were reached, and would chafe at being chained to a few peremptory words ; but the gain to the public would be incalculable. In Scotland, especially, it would be great : for even when the law of England was adopted we should obtain the results, often most enlightened and salutary, without being weighted with the subtle, and sometimes questionable reasoning by which they were attained.

I might find another illustration of the effect of social change in removing the apprehensions on which laws have proceeded in those which have sprung out of the fear or distrust of the people. To enter on the political phase of this question would be entirely beyond the province of my duty here. Yet the enlightened jurist will mark with satisfaction how social progress and the spread of intelligence have broken down the rough and coarse barriers which a ruder age set up against popular license, partly, no doubt,

from a sounder view of public justice and experience, but partly also, and mainly, because the times have outgrown the danger.

One class of laws, which, to a certain extent, may fall under this category, I should have been tempted to enlarge on, but I find the subject too nearly allied to political feeling to do more than allude to it—I mean what are termed the Labour Laws, a subject which, in the present day, excites a lively and natural interest, and which is well worthy the attention both of the philanthropist and the jurist. It would not be uninteresting to trace the progress of the laws relating to personal service, from the period when Gurth, the son of Beowulph, and Wampa, the son of Witless, bore round their necks the badge of serfdom, through the middle period of feudalism, to the present relations of employer and employed. No history could better illustrate the imperceptible and gradual but effective changes which time and progress have operated on the Statute Book; and here, also, the change has arisen, not from the supreme power, but from below—from the increased intelligence of a free and enterprising population. Even from years not so remote, the change from the harshness of the law, when some branches of personal service still retained the ancient fetters, to the more recent revision of the Combination laws, we can discern plainly the marks of social improvement obliterating the traces of obsolete distrust. These causes will still continue to operate. Controversies remain which I do not now stop to solve, or even to consider; but, affecting as they do, a relation which is the broad basis on which national prosperity is built, they well deserve earnest and kind consideration. But these are more economical than juridical questions. Their ultimate solution must rest in the good sense, prudence, and sagacity of those chiefly concerned. There are economical laws which are superior to any which are written in the Statute Book, and which are never violated with impunity. As in the material world we are told that every exercise of force operates in a corresponding

diminution of power, so in the relations of capital and labour, everything which tends to diminish the security for the employment of capital finds its compensation, and that compensating element is sure to strike the weaker in the end.

Another class of laws are founded on fear of fraud ; an element which runs through much of the history of the Scottish system, and a good deal of which still remains in it. I do not mean to question the soundness of the views on which several of these provisions proceed, on which probably Scottish languages might differ ; but in some aspects of their operation they appeared in former times, and perhaps to a certain extent they appear still, to favour the principle, that it is better that twenty honest men should be cheated according to law than that one rogue should succeed. Their tendency is to exclude the light for fear of fraud, forgetting that darkness may sometimes favour fraud, and that light may detect it. Thus the whole of that category of the Law of Scotland which limits proof to the writ on oath of the party seems to assume that the limitation is in favour of the interests of truth, and that a wider inquiry into facts would lead to error and favour fraud. In instances in which this restriction takes effect only on the lapse of time—a period of prescription—it is reasonable. But in others it is more questionable. Thus trust can only be proved by the writ or oath of the alleged trustee, a law which had its origin in the troubles in the 17th century, when estates were conveyed from one to another of the family, as Cavalier or Roundhead had the upper hand. The allegations that property was truly held in trust became so numerous and so troublesome that the litigant alleging trust against an *ex facie* title was restricted to prove it by the writing or the oath of his antagonist. At that date, probably, the law was salutary, but the danger of these frauds has departed and has left the law behind it. So payment of money cannot be proved by witnesses, nor can want of value for a bill of exchange. In all these cases the only real position is, not whether, in some

instances, proof by witnesses might aid a fraudulent design, but whether, in the majority of instances, the truth is best established by excluding or by admitting such testimony. As a general rule, I should think truth is more likely to be discovered by admitting rather than by excluding light.

The fear of an extraneous result, leading to legal provisions otherwise opposed to manifest justice, had its culmination with us in the rules which include the testimony of certain witnesses through fear of perjury, *ob metum perjuriae*. This was truly preferring the interests of the witness to the truth of the case and the interests of the suitor. It mattered not that the witness was individually above suspicion; that he, perhaps he alone, could establish the truth; still he was not permitted to tell what he knew, because, from his position, he might have an interest to speak falsely. The fallacy of this law is manifest, and the amount of injustice to which it led was incalculable; yet it is only since I and my contemporaries came to the Bar that it has been materially modified.

So much of laws based on apprehension or fear. I proceed to a second class, namely, laws resting on imperfect or exaggerated distinctions.

The first instance which naturally occurs is the distinction which prevails in England, and in English-speaking communities only, between law and equity. This is too obvious an instance of my general proposition to require me to enlarge on it. There is no distinction between law and equity, in any philosophical acceptation of these terms, for equity is the basis of law. Law divorced from equity is a monster which could have no place in any system of jurisprudence. But the truth is that in England the distinction is not truly expressed by the nomenclature. It is not one between either the subject-matter or the objects of jurisprudence, but one solely of courts and jurisdiction; not what the right is or what the remedy should be, but solely from what tribunal redress can be given. It never could have arisen save from the jealousies of coördinate courts; and the distinction can only be arrived at by confining the terms within

arbitrary rules which deprive them of their primary meaning. No other system, ancient or modern, ever made such a partition, as far as I know. Recent legislation has attempted to terminate the reign of this anomaly, as far as theory goes; but there has sprung up around each of those divisions so strong a growth of distinctive principles and formularies, in the course of centuries of able administration, that it will take many years before the rival camps will effectually unite. Probably they never will until their mutual technicalities are merged in a code.

It is more in accordance with my present object to refer to a very familiar and well-recognised distinction which prevails in all European jurisprudence—I mean that between real and personal property, or, as we should call it, between heritage and moveables.

Of course the distinction itself is not imperfect. There is a perfect distinction between that which the owner can carry about with him and that which in its nature remains fixed. To some extent also this natural and physical distinction must vary the forms of transference and the evidence and nature of title. But we are apt to forget, from long familiarity with artificial consequences of the division, that beyond this there is no philosophical distinction at all. Reasons of State or social policy or expediency may have created variations, but these must rest either on their own intrinsic utility, or on the effect of ancient usage and tradition. These are mainly to be found in the forms of transfer, including attachment for debt and the rules regulating succession.

I see by the report of a discussion which took place at the recent meeting of the British Association that our distinguished countryman, Sir George Campbell, maintained that rights to land were not absolute but limited rights, in the person of the proprietor. Historically, Sir George Campbell was quite right. In all the feudal countries the land was the property of the Crown, by right of conquest, and while these were obtained by subjects, by grant from the Crown,

the Crown remained the landlord, while similar subordinate rights might be created by the Crown vassal, all depending on the inherent right in the soil vested in the Crown as universal superior. From the very superficial acquaintance I have with the land-rights of Hindostan, I should be inclined to think that, in many districts at least, the ancient tenure was strictly feudal, answered as nearly as might be to the Crown vassal, sub-vassal, and cultivator with us. So far as land, from its nature, admits of separate and limited interests in it subsisting at the same time, this is a peculiarity inherent in the quality of the right. But in other respects the characteristics of the feudal relations in it are purely adventitious and artificial, not attaching to the subject of property, but to the mode of acquisition, and the extent and interest in the property which is acquired. But is not this one of those distinctions which time and circumstances have reduced to a shadow ; so much so that in England the substance of it has long vanished, and the very memory of it has perished, save in a very few surviving and exceptional traces ? The proprietor is no longer a *locum tenens* for the Crown or for the public ; he is simply proprietor.

The purely feudal forms have lingered longer in this end of the island, but they have remained only as a very scientific and logical system of conveyancing, and, coupled with the thorough system of Registration of Deeds which our lawyers have always considered the bulwark of our law of real property, afford as secure and complete a series of titles to land as any country possesses. The fear of publicity, arising from our Register of Deeds—an element I might have included under the former head—has never disturbed the spirit of the lawyers or landowners of the north, nor do I believe that any nation which enjoys a complete Register of Deeds ever found the slightest element of inconvenience from this source to qualify its immense advantages. But the old forms were cumbrous and expensive, although precise and secure. When I addressed this Association, thirteen years ago, I find, from the draft of the observations which I then

made, that I had intended to express the opinion that the time had come when these feudal forms might be entirely abandoned ; but on reflection I thought the proposition too sweeping, and simply indicated an opinion that the juridical mind was not yet ripe for the change. But time and public opinion and the greater courage of my successors have brought about a great and most salutary advance in this direction. I was, and am still, of the mind that the thorough measure proposed by Lord Young might, as regarded its broad lines, have been adopted both with safety and with benefit. Still I view with satisfaction the important measure modified as it is, which was passed last session in the hands of the present Lord Advocate, and I consider it a valuable instalment towards the simplification of rights to land. While, however, much may still remain to be done in the simplification and cheapening of the transfer of land—a subject my limits will not permit me further to discuss—I have no idea that any amount of legislation in that respect will ever have the effect of extending the property in land to the less wealthy classes, or of assimilating its transfer to that of personal property. What may be done in a new country, in which the value of land is inconsiderable, is another matter ; but with us, among whom the value of land is rising every day, the nature of the property itself, and the old traditions and instincts of the country, will always require, in the forms of the transference of land, an amount of care and security not appropriate to personal property. It is not the expense of acquiring or transferring land, but the expense of holding it, which prevents the larger diffusion of this species of property—not the laws of the Statute Book, but those of political economy ; and nothing but sumptuary laws entirely irreconcilable with the freedom of trade could prevent this result. As long as the return from land is less than the ordinary return from capital invested in trade or in ordinary marketable securities, the man who can afford to hold it at a sacrifice of income must necessarily exclude the man who cannot ; and no diminution in the cost or difficulty

of transfer will have the slightest effect on that necessary consequence.

While, however, I doubt if it will ever be practicable to place the transfer of land on the same footing as that of ordinary personal property, there is one direction in which the distinction seems to be pushed to an extreme, and in which the law appears to be drifting into considerable confusion. The matter is somewhat technical, but in a large mercantile and manufacturing community, such as that in which I now speak, it has some features of considerable importance. I refer to the law relating to accessories and land. From the traditional and ancestral right to broad acres to the property of a few spinning machines inclosed by old brick walls and driven by a steam-engine put up yesterday, and which may be taken down to-morrow, is a great transition. To extend the law of land-rights to a species of property as thoroughly personal in its own nature as a cart or a wheelbarrow, seems a caricature of this legal distinction. No doubt proper accessories—things which are truly subordinate to the enjoyment of real property, and for that purpose are fixed to the soil—may become real by accession. But when the building itself, the machinery, the moving power, are all parts of one machine, placed for the purpose of carrying on a trade or manufacture, and without the slightest intention of altering the nature of the articles, it seems to me to be an example of exaggeration to deal with these as if they savoured of reality or were anything but what they are, stock-in-trade. There are, I know, elements of convenience as well as of mischievous anomaly in the doctrine. It aids in the use of stock-in-trade as a fund of credit, while it seems to extend (I do not say it does) the law of primogeniture to a case to which it appears absurd to apply it. It is one of those parasitical subtleties to which I alluded in my introductory remarks.

Another adventitious or artificial result of this distinction exists in the law of primogeniture itself—the descent of the real estate to the eldest son in the absence of settlement by

the owner. The abstract utility or justice of this state of the law—a remnant, doubtless of feudalism, although probably much older, historically—I do not now stop to discuss. Its practical importance, while the power of settlement remains, is not of the magnitude which theorists frequently represent it to be. It seems to be one of those institutions so largely interwoven with the habits and associations of this country as, for the present at least, to be beyond the pale of controversy. Hardships it has, undoubtedly; but it has also fostered among the younger branches of landed families a spirit of enterprise and manly independence which has largely tended to the prosperity and power of the nation. What I have to say or suggest on that subject may be embraced under my last subdivision—namely, imperfect or exaggerated analogies.

Here, also, I take as my illustration a very elementary and universal analogy—I mean that which subsists, or is supposed to subsist, between a man's power over his property while he lives, and his power of disposing of it after his death. The analogy is imperfect on the face of it, however deeply bound up with our habits and instincts. The law of wills and settlements is an artificial, not a natural law. The main object and end of law is to enable a man, while he lives, to do as he pleases with his own, provided he do not injure his neighbour. But he cannot take his worldly goods with him when he dies, nor can he in any sense enjoy what he has left in the visible diurnal sphere which he has quitted. Why, then, it may be asked, should the acts or expressions of the man while he lived be held to control the unforeseen, in which he can have no lot?

To this philosophy can but imperfectly reply. Instinct gives a reply which all nations and systems have more or less recognised; but, in dealing with this analogy, it is sometimes too much forgotten that the power of settlement or testamentary bequest is the gift of positive law, and rests in no respect on natural right.

There are two principles on which the privilege may be

supposed to rest. One is a reasonable consideration of social expediency—that he who is best acquainted with the position of his own affairs, and the wants and necessities of his family or relatives, should have a pre-eminent voice in the partition of his goods among them after he has ceased to provide for them himself. The other has its root in the clinging desire of the soul to have still some part in this transitory scene, the craving for posthumous power, whether in the goods or the name which he may leave.

Major pars mel
Vitabit Libitinam,

was the proudest thought of the Roman poet ; and the hardship of being compelled to quit all hold on what absorbed so much thought and interest during life sanctions the reverence with which we regard dead men's wills ; nor has any system failed to follow the common sentiment of humanity. The power of making a will is as old as history, and I see from recent Oriental discoveries that we are now in possession of the settlement of no less a personage than Sennacherib, who, in terms quite in accordance with our own usages, and a brevity very little in accordance with them, leaves the whole of his personal succession to his son, Esarhaddon, who reigned in his stead.

Yet there are few countries in which jurisprudence has not to some extent qualified the analogy of the right of testing to a right of property, and marked the distinction between the perfect and the imperfect right, although the provisions of different systems vary. In France the owner cannot settle his real property, but all must be divided. In England his power of settlement extends to all his property. In the Thelluson Act, however, by which accumulation beyond a reasonable period is prohibited, the distinction I refer to is acknowledged. With us, until very recently, the power of settling real estate was nearly unlimited ; but we have always acknowledged the justice of restricting the power of a father over his personal estate by certain specific rights in his children.

The power of settling real estate in this country practically reduces the law of primogeniture as regards proper land estate within very moderate bounds, and, as I have already said, the rule is too firmly fixed among us to be open, at present at least, to question. The inconvenience of the law practically is much more felt in regard to those kinds of property for which it never was intended—house property in towns and others, which follow the soil by accession. Of these I have already spoken. While, however, I do not expect to see any alteration on this leading feature of the descent of land among us, I remain of the opinion, as I said on a former occasion, that the right of settlement should not go beyond the first donee: in other words, that it would be beneficial to all classes to see the power of entail substantially abolished. If this power had ever had beneficial results, they are all worked out long ago. I know no good which they effect. They retard the improvement of land, they impoverish the younger branches of the family without enriching the elder, they hang like a millstone round the neck of an heir in possession, they insensibly exaggerate what were mole-hills of debt until they overshadow the ancestral acres, preventing the useful application of the resources of nature and of science, in order that posterity may succeed and be crippled in its turn. It is, in my opinion, a mistaken policy. So far from preserving ancient families, it is the true secret of their destruction. I believe it will be found that a large amount of land in the hands of the great proprietors has descended from generation to generation in fee simple, and I am quite certain, that where it is so agriculture and enterprise have left their mark.

I own, therefore, that I should like to see entails abolished, the power of settlement only remaining. Much has been done by the Rutherford Act in removing these evils. Something still remains to be done. There are, no doubt, some interests in expectancy under the old law so close that it may be right to consider them; but that is a mere matter of time and of detail, which presents no real difficulty in adjustment.

Short of entailing land, the power of settlement seems entirely reasonable. It is remarkable that those who think otherwise, and lean to a constant subdivision of land, have never proposed to put any restrictions on the absolute power of a testator over his personal property. Yet the right of legitim which we have borrowed from the Roman law has much more to recommend it than a perpetual subdivision of land. The highest development of the fertility of the soil can only be attained on a considerable scale. But there is no difficulty in the division of money, and I am inclined to think that on the whole there is reason and justice in the law which secures to younger children a portion of their father's personal succession.

The last illustration I shall mention under this chapter of my subject has reference to charitable bequests--a subject of no small interest in the present day, and one which affords many examples of the truth of some of the principles I have endeavoured shortly to enforce. What are we to say of a mischievous or useless charitable bequest? The law protects it, and of course, while the law stands, must continue to protect it. But it is hard to say to which of the canons of useful or philosophical law it conforms. It is not adapted to the wants of the times, for the tide has ebbed from it and left it on the shore. There are no existing interests which it promotes, because, as it is mischievous or useless, it can promote no interest. The will of the testator is in some sense a mere phantom, for he has no present will. In many instances there is no reason to suppose that if he were here among us he would maintain his bequest for a moment. All that can be said is that the integrity with which the law invests such bequests is an operative element in the action and proceedings of men during their lives, and regulates the use which they make of their property, and that it would destroy their confidence in the law were their settlements liable to be disturbed. Nevertheless, in dealing with this question, while extremes should be avoided, and the intentions of the donors carried out as far as this can be usefully done, I find

no legal principle, as I find no suggestion of reason, which should induce me to join in the remonstrances which arise at every attempt to turn such bequests into a fertilizing channel.

I had intended to have added to these remarks, as illustrative of the general views I have endeavoured to enforce, a few observations on public international law; but I fear I have already exceeded my appointed limits. I know, however, of no branch of jurisprudence of which it is more true that time has obliterated many of the ancient boundaries, and by altering the relations of the civilized world made a thorough revision of the received formularies desirable. International law is, of course, an imperfect branch of jurisprudence—having no supreme authority by which it has been prescribed, or can be enforced; and although founded, or professing at least to proceed on general principles of natural justice, yet resting in reality on convention or contract, express or implied. Who made these contracts, when were they made, and for what ends, or whether they were not rules imposed by the stronger, and submitted to, rather than accepted, by the weaker, how far the belligerent and neutral world has changed since the days of Puffendorf and Grotius, and what are the merits of the modern school of Continental publicists; wherein the true interest of this country lies, as regards the controverted questions of neutrality and contraband of war, and how far a nation is entitled to follow the course to which her national interest would incline, are questions of the deepest moment, which will probably assume larger proportions in the future. I cannot now stop to consider them, and must bring this address to a close, in the hope that what I have said, however superficial and desultory, may not altogether fail of its objects as introductory to the labours of this section.

II.—THE TERMINOLOGY AND ARRANGEMENT OF THE LAW OF PROPERTY.

(Continued from the September number, page 817.)

IT is intended in this paper to conclude the general review, which has been partially attempted in two previous numbers of this Magazine, of the English Law of Property, with the examination of a few topics which lie on the threshold of the subject and which have not yet been dealt with, namely, vested and contingent rights, the various species of joint ownership, the different kinds of servitudes and modes of acquisition. Anything approaching a detailed development of the topics touched on has been avoided, the object of the writer being rather to direct attention to the subjects discussed than to make an exhaustive examination of them.

"Vested" and "Contingent" Rights.—Of this branch of the law of England, the writer of a well-known text book has said that "notwithstanding the uncertainty still remaining with regard to one or two points, the whole system now presents a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles;" and possibly this department of the law will bear a favourable comparison with other departments. But from the point of view of a student of general jurisprudence, it would seem more correct to describe it as a complex and abstruse system darkened and obscured at every step by the merest technicalities, and overloaded with jargon and rubbish. The nomenclature alone is something truly alarming. Vested remainders, contingent remainders, reversions, particular estates, estates in possession, estates in expectancy, possibilities, double possibilities, *potentia duplex*, *potentia remota*, contingencies with a double aspect, possibilities on a possibility, executory interests, shifting uses, springing uses, powers, appointments, executory devises, *scintilla juris*, possibility of seisin, are the ingeniously devised expressions with which the system abounds. But *cui bono*?

For what purpose has all this complex and perplexing machinery been invented? Merely to accomplish an object than which, considered naturally, nothing need be simpler. To enable a person to give property to several individuals in succession, surely requires not machinery so elaborate, nor for the description of the various kinds of interests which the caprice of a testator, or settlor, may induce him to create, can it be at all necessary to resort to terms so grotesque and unmeaning. Everything that is now accomplished with these artificial materials might be as adequately and effectually accomplished by machinery the most simple, and described in language the most natural. There is nothing to call for the slightest artificiality or for a single technical expression. If any owner of land wishes to create a succession of future interests in it, what is there in this to produce difficulty? Naturally nothing. It is entirely to the influence of the technical rules arising out of feudalism that the complexity of the system is to be attributed. That such is the true cause of the evils, and that in the present state of the law when those rules have lost their purpose, the object they are employed to effect could be accomplished by far simpler means, a brief examination will suffice to show.

The various kinds of interests recognised in English law other than an estate in possession may be reduced to these four: reversions, vested remainders, contingent remainders, and executory interests, a four-fold division which has no justification from the nature of the subject, but produced by accidental causes. The true distinction which should be drawn between these various modes would seem to be between, on the one hand, rights of which the enjoyment is postponed; and, on the other, expectations of rights. Reversions and vested remainders may be properly enough called rights; the right exists, but will not take effect in possession until the determination of some prior estate. Contingent remainders and executory interests, on the contrary, are not properly rights at all, but mere expectations of

rights which may or may not be fulfilled. The happening of a contingency in their case is a necessary preliminary not merely to the enjoyment of the estate, but to the very existence of the right, which even after the happening of the contingency may be subject to a further delay before taking effect in possession ; though it may sometimes happen that the event on which the right is to come into being is also the fact which originates the enjoyment thereof. That this account of the matter is consistent with the usual definitions, a reference to those definitions will suffice to show. A reversion is defined to be the interest of a tenant in fee simple, which remains undisposed of when a less estate has been granted by him ; a vested remainder is said to be an estate limited after a prior estate which is always ready from its commencement to its end, to come into possession the moment the prior estate happens to determine. It is evident, therefore, from a comparison of these two definitions that a reversion and vested remainder are, so far as the nature of estate is concerned, identical. They are equally rights of which nothing but the enjoyment is postponed. A contingent remainder, on the other hand, is defined to be an estate limited after a prior estate, and distinguished from a vested remainder by being not yet ready to come into possession should the prior estate now determine, and which will only become so ready when, by the happening of a specified event, it ceases to be a contingent, and becomes a vested remainder ; while an executory interest, agreeing with a contingent remainder in its not being yet ready to come into possession, differs from it in this, that it has not to wait for the determination of a prior estate before taking effect in possession. Contingent remainders and executory interests have, therefore, this characteristic in common, which essentially distinguishes them from reversions and vested remainders, that they confer no rights whatever until the happening of the contingent event. A reversion or a vested remainder, it is true, may possibly never take effect in possession by reason of the death intestate and without

heirs of the party entitled, and in this respect an analogy may be claimed for it with a contingent remainder or an executory interest. But the analogy extends no further; the difference is not merely a difference in degree of possibility, but a clearly distinguishable difference in the essence of the modes of interest. There is in the one class a right, in the other no right at all, but an expectation or probability of a right hereafter arising, which may be compared rather with the *spes successionis* of the eldest son of a landowner, than with any kind of right properly so called. Nor is this view of the matter inconsistent with the power of alienation attached to the interests in question, for what is in fact alienable, wherever alienation is possible, is nothing more than a possibility; and alienation is frequently quite out of the question, as where a remainder is contingent by reason of the person for whom it is intended being not yet born.

This distinction, which seems to be natural and necessary, is obscured in English law by the excessive prevalence of artificial rules, which are only to be accounted for by historical explanation. The feudal law required the freehold to be always in some one's *seisin*; it must never for a single moment be out of possession. It is intelligible, therefore, that when a series of estates was granted in succession the mode of limitation must be such that each successive interest should necessarily be ready to take effect in possession immediately on the determination of the preceding estate, without a moment's interval elapsing between the determination of the one and commencement of the other. For the enforcement of this principle, the following rules were called into being: that no estate may be granted (except by way of remainder) so as to commence at a future time, that there must necessarily be some "particular estate" precedent to an estate in remainder; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate, that remainders must be limited to take effect in possession immediately on the determination of the particular estate

and neither later or earlier ; that every contingent remainder must become vested either during the continuance of the particular estate or *eo instante* that it determines. These rules, it is obvious, are merely technical ; there is nothing in the nature of the subjects dealt with to produce them. As might be expected they were found to produce inconvenience, and this inconvenience was remedied in the usual English fashion, not by a remodelling of the law, but by the evasive process of inventing a new kind of interest, derogating in the most revolutionary manner from the feudal principle, though disguised by an outward compliance with the feudal rules. The inconveniences which had arisen consisted in this that it is frequently desired to create interests in such a way as to commence at a future time and yet without waiting for the determination of a prior estate ; or to take effect notwithstanding the determination of the prior interest before the subsequent estate is ready to take effect in possession. The remedy was most strikingly technical. It consisted simply in a dexterous employment of the word "use," a word of indeed magical operation in English law. And thus we find that a future estate which, according to the old rules, cannot be created, may according to the more modern practice exist, notwithstanding those rules. The rules remain, but the artificial employment of the word "use" is sufficient to evade them. For example, where, as in the case of a settlement made in contemplation of marriage, it is intended to grant an estate which is not to take effect till the solemnization of the marriage, this cannot be done by means of a contingent remainder by reason of the rules already referred to ; and so if an estate be given to a person for life and after his decease to an unborn child on his attaining the age of 21 years, and he is not 21 years old on the death of the person entitled to the prior estate, the gift fails. Yet by resorting to the convenient machinery of uses, the desired object may in each case be accomplished. An executory interest, created by means of a "shifting use" is all that is necessary.

It follows, therefore, that the old rules have become useless,

since an interest which they prohibit may be created in spite of them; and, on the other hand, they accomplish nothing which under the existing law could not be accomplished without them. There is in fact no place now for the distinction between contingent remainders and executory interests. The difference between them is not natural, not even substantial. To eliminate contingent remainders entirely would not in any way lessen the power of disposition incident to property; an executory interest would do the work as effectually. Not that the absorption of contingent remainders into executory interests is to be recommended as a means of simplifying the system. Such a process would be simply absurd, for the whole system needs recasting. But the possibility of such an assimilation of the two kinds of interests without affecting the actual law is conclusive evidence that the distinction between them is no longer tenable. This may be still further illustrated by contrasting with the remainders in real property the method of settling personal property. Remainders in personality, properly so called, are not recognized; nor indeed at law can any kind of future interest be created. This is frequently expressed by saying that in personal property there are no estates; that no interest less than absolute ownership can exist in a chattel, and this statement when limited to the Common Law is true enough. In equity, however, future interests may be created, and in a way much simpler than the methods applicable to real property. As personality was not subject to the feudal rules of property, and did not come within the Statute of Uses, much of the complexity and technicality existing in regard to realty is here absent. The noticeable point in the present enquiry is that there is no such distinction as that between contingent remainders and executory interests, a circumstance which sufficiently confirms the assertion that that distinction arises accidentally, and not from the nature of the subject. By means of trusts future estates may be created in personality, to the same extent as in realty by

contingent remainders and executory interests; but by much simpler means, and without being incumbered with a multitude of artificial distinctions.

It is submitted, then, that the four-fold division of future interests in property into reversions, vested remainders, contingent remainders, and executory interests, is unjustifiable. It is not founded on any natural difference in the subjects classified; and applicable only to what is called real property. In a body of law moulded systematically, and upon a natural basis, an arrangement would be required which applied equally to all subjects of property, because, as shown in a former paper, there is no ground for distinction between realty and personalty. The natural arrangement has been already suggested—a division into rights of which the enjoyment is postponed on the one hand, and mere expectations of rights on the other. Upon this basis a system might be constructed applicable equally to all the subjects at present so unnecessarily separated under the heads real and personal property, unincumbered with the complexity resulting from the now effete feudal system, and expressed in language at once significant and simple.

Joint Ownership.—In regard to this subject also there is much room for simplification. There are at present four different ways in which the same subject may be the property of more persons than one at once: viz., joint tenancy, tenancy in common, coparcenary, and tenancy by entireties. Neither of these different species of *condominium* is free from objection, nor would any such distinction as is drawn between them in English Law be found in a well organized system. An examination of each in order will show how much the law relating to them might be simplified. Joint tenancy, in the technical signification of that expression, may be described accurately enough as ownership by several persons as if a single person. They together own the whole; neither is entitled to a distinct share. Their position, collectively considered, corresponds to that of a tenant in severalty; individually, neither can be said to have a

separate right of property. From this view of joint tenancy has arisen the singularly harsh rule that, unless a partition or disposition of the property be made, the whole of it must go to the survivor. The future owner may be determined by the merest accident; for nothing to human perception may be more sudden or unforeseen than death. That inconvenience was felt from these incidents of joint tenancy is not surprising. The position of the parties has been humorously illustrated by an American story, in which an elephant is represented as belonging in common to two men, one of whom declines either to pay anything to the other in the shape of profits of exhibition, or to buy his co-owner's share, and is at last brought to reason only by the threat of the injured party to shoot his undivided moiety. This, however, only hits off the inconvenience of joint ownership in chattels; in land the inconvenience of joint tenancy may also be very great. For example, if the subject be a house either or both of the joint tenants may enter into and occupy any room in it. Both as regards the enjoyment of the property during the lives of the joint tenants, and as regards the incident of survivorship, is joint tenancy objectionable. The remedy originally introduced was but partial and sometimes very difficult of satisfactory application, namely, partition. To make an exact partition is frequently impossible, the property not admitting of equal division; and some very curious results of partition are to be found recorded in the reports. In one case, for example, where there was a house to be divided the whole stack of chimneys, all the fire places, the only stair case, and all the conveniencies in the yard were given to one joint tenant. The difficulty and inconveniencce thus experienced by partition has led to the more satisfactory remedy of sale, the Court of Chancery being now empowered to direct a sale instead of partition, whenever a sale and distribution of the proceeds amongst the parties entitled, appears to be beneficial. Concurrently with this tendency to avoid the inconvenience of partition, it is noticeable that equity has long inclined towards abolition of joint tenancy, and has, in many

cases, construed what strictly would be a joint tenancy to be a tenancy in common. When it is remembered, also, that any joint tenant may, at any time, turn the joint tenancy into a tenancy in common, by disposing of his undivided interest, it will be perceived that joint tenancy has virtually lost its purpose. There is only one case in which there is anything to be said for it, and that is the case of trustees who obviously are intended to hold as a single person, and not as entitled to distinct shares. This, however, its only redeeming feature, is but a poor apology for it, and is hardly sufficient to save it from the condemnation which, in other respects, it seems to deserve. Nor is tenancy in common, though it may compare favourably with joint tenancy, a species of *condominium* altogether desirable. Its distinguishing characteristic is freedom from the harsh incident of survivorship attaching to joint tenancy, which alone has procured for it the favour of the Court of Chancery. But it is obviously far less convenient than an estate in severalty, and partition, as in the case of joint tenancy, has been put into operation to remedy its inconvenience. The application of this remedy and that of sale to the cases both of joint tenancy and tenancy in common, has had the effect of rendering either a very infrequent mode of holding, and probably there is little land in the country, other than that vested in trustees and mortgagees, subject to joint tenancy or tenancy in common. The expediency of either may, therefore, be seriously doubted. As to the other kinds of joint ownership, coparcenary and tenancy by entireties, the latter may be dismissed from consideration, it belongs to the law regarding the relations of husband and wife. Of coparcenary it may be said that, like joint tenancy and tenancy in common, it is inconvenient. A sale of the property and division of proceeds amongst the coparceners would seem a more desirable thing than the present tenancy in coparcenary. But applying the considerations which have been here suggested what would become of joint ownership of any description? Carried to their legitimate consequences they seem to condemn *con-*

dominium of every kind, and possibly the condemnation is deserved. Community of property is necessarily inconvenient, except in the cases of trusts, partnership, and marriage. In every other case a sale of the property and division of the proceeds is desirable. However this may be it is conceived that in a rational reconstruction of the Law of Property the peculiar species of *condominium*, known as joint tenancy, tenancy in common, and coparcenary, would have no place.

Servitudes.—The nature of servitudes and the distinction between them and the various modes of property as the basis of arrangement were described in a former paper. It has also been shown that in English law there is no distinct class of rights called servitudes, but that the rights which that expression is intended to include are thrown together miscellaneously with a number of other rights with which they have nothing in common, into a class designated by the misleading and absurd title “incorporeal hereditaments.” The consequence is that the true nature of these rights and their relation to rights of property, specifically so called, have been obscured. It will be necessary, therefore, in the first place to examine the constitution of this class of “incorporeal hereditaments,” and to pick out from the heterogeneous collection those of the rights which come under the head of servitudes; and then to suggest an arrangement of the class thus obtained. The principal of the different species of “incorporeal hereditaments” are the following: Profits *à prendre*, which include rights of common of various kinds, rights of fishing and hunting and the like; easements, (which consist *inter alia* of rights of way, right to light, right to air, right to support from adjacent soil, right to discharge water or to receive a flow of water, right to bury in a vault, right to use a pew in a church, right to hang clothes over the land of another); advowsons; • titles; seignories; franchises; dignities; corodies; annuities; pensions; rents. Of these numerous kinds of rights those only included under profits *à prendre* and ease-

ments seem to be properly servitudes, and consequently those only which here claim attention. The distinction between profits *à prendre* and easements is this, the former consist in the party entitled taking some profit out of the land, for example, by turning cattle on to land for the purpose of pasture, or by taking wood, or by catching fish or fowl; whereas an easement consists merely in using its subject in a particular way, or in a right that the owner of a parcel of land shall forbear, for the advantage of the party entitled to the servitude, to use the land in a particular way. The distinction is an intelligible one, and might be conveniently enough adopted as the main division of the class of servitudes. It represents a clear distinction between the different kinds of servitudes, and in the present state of the law of prescription it is a distinction of practical consequence, profits *à prendre* falling under one section of the Prescription Act, easements under another, with the result of a difference in the periods required for their establishment by user. The celebrated division of servitudes, in so great favour among jurists, into affirmative and negative servitudes, is hardly so applicable in English law considered as the primary division of servitudes as this into profits *à prendre* and easements. All profits *à prendre* are affirmative; to them therefore it cannot apply; being applicable only to easements, it seems more appropriate to take it as the basis of a subdivision of easements than a general division of servitudes. We should then have profits *à prendre* on the one hand, easements on the other, the latter subdivided into affirmative and negative. By an affirmative servitude is meant a right to put the subject of another's property to a particular use; by a negative servitude a right to a forbearance on the part of an owner from putting his property to a particular use. The only negative easements appear to be rights to ancient lights, to air, and to the support of neighbouring land. All the other rights above enumerated as included under the term easement, seem to be affirmative. But these terms affirmative and negative are not altogether free from objection. In one

sense every servitude is negative ; every servitude is a right to a forbearance on the part of the owner of the *res serviens*, never a right to an act on his part. It is the position of the party entitled to the servitude that is regarded in using these terms ; where he is entitled to use a subject, his right is affirmative ; where he is merely entitled to a forbearance, as that his ancient lights shall not be obstructed, his right is negative. And, for marking this distinction, the terms seem to answer the purpose well enough. Another division of servitudes to be found in treatises on jurisprudence is into real and personal, which seems to correspond with the English distinction into rights appurtenant and rights in gross. By a real servitude is meant a right belonging to a person by reason of his being owner of a parcel of land ; by a personal servitude a right existing independently of such ownership, and belonging to the party entitled not as owner of land, but as an individual. The distinction refers therefore to the title by which a servitude is acquired rather than to the nature of the right, and is consequently foreign to a classification of rights of servitudes. It may be added that the terms are not significant enough to mark the distinction they are employed to represent. They do not themselves suggest the meaning attached to them. The expressions, " appurtenant " and " in gross " are perhaps better, though clumsy enough. Appurtenant and non-appurtenant would express the meaning more significantly. It is suggested, then, that the main division of servitudes in English law should be into profits *à prendre* and easements, which has the merit of representing a distinction already recognised, and the advantage of being expressed in established language which must always be preferable to new terms ; easements being then subdivided into affirmative and negative, which has this practical consequence in respect of the mode of acquiring and losing rights, that an affirmative servitude is generally intermittent, a negative servitude continuous.

Title.—The English law of title, in other words the law relating to the methods of acquiring property, presents a

wide scope for simplification. Much as has been done during the present century to improve the law regulating the transfer of land, this department of the law is still disfigured with useless distinctions and clumsy devices. It is here that realty and personalty are so prominently opposed to each other; and here consequently are the effects of that absurd division more strongly marked than elsewhere. It is here in an eminent degree that the law accomplishes its object through indirect and evasive means. It is here also that we find the singularly harsh disposition of an intestate landowner's property in favour of a single child. Unsatisfactory, therefore, is this branch of the law, both as regards arrangement, modes of conveyance, and policy. To adequately discuss these various points would require far greater space than can be here devoted to them. All that can be now attempted is briefly to run through the various kinds of titles and make a few general observations upon them. The most appropriate primary division of titles appears to be into those which arise from the voluntary alienation of owners, and those which do not. The former head may be subdivided into transfers *inter vivos* on the one hand, and testamentary dispositions on the other. Transfer *inter vivos*, then, first claims attention; and on the threshold of this subject we have to encounter the distinction between realty and personalty, which occasions this difficulty, that although it runs through the whole system of title, it produces no uniformity of transfer amongst the various subjects of the opposed classes. So far as title is concerned the distinction is useless and without meaning. There is, indeed, this verbal difference, that transfers of real property of every kind are called conveyances; of personal property, assignments; but this difference is merely verbal; assignments of personalty frequently resemble conveyances of realty more nearly than assignments of other kinds of personalty. The difference, for example, between an assignment of a lease for years (which is personal property) and a transfer of goods by delivery is very much greater than the difference between

this assignment of a lease for years, and the conveyance of a leasehold for life, though the latter is realty. "No satisfactory arrangement of the modes of transfer, therefore, is possible with the distinction between real and personal property standing in the way. The only course open is to enumerate the different methods of alienation applicable respectively to the various subjects of property. For the conveyance of land there are at least five different modes available,—the usual deed of grant, the old lease and release, the release under the Act for making a release as effectual for the conveyance of freehold estates as a lease and release, a bargain and sale enrolled under 27 Hen. VIII, c. 16, and a covenant to stand seized to uses. This multiplication of conveyances is of course quite unnecessary, the first being that alone resorted to in practice. The others might be very properly abolished, if only for the sake of simplicity. Their preservation is not required for any purpose whatever. With regard to the remaining conveyance, the deed of grant, which is the only ordinary mode of conveyance, much cannot be said in its favour. It is a very indirect and round-about means of accomplishing a very simple object, depending, as it does, for its operation, on a technical employment of the word "use," the utility of such a device having, nevertheless, passed away. Much complexity and difficulty might be removed from the Law of Property by the doctrine of uses being altogether eradicated. The object of the Statute of Uses was entirely defeated within a short time of its passing; and its retention has no useful purpose; for, as was remarked by Lord Hardwicke, its only practical effect is to add three words, "to the use" to every conveyance, and, it might also be added, to create considerable confusion and perplexity. There is no reason whatever why a conveyance of land should not be made directly, and without any such device as that of making one person a conduit pipe for passing an estate to another, or still more absurdly making the transferee a conduit pipe for passing an estate to himself. There are not wanting, even, those who advocate the trans-

fer of land by a mere change of name in a register. With that, however, we are not at present concerned. Compared with the conveyance to uses, just noticed, the lease of a term of years appears in a favourable light in point of directness. The lease is made directly to the intended tenant without the introduction of uses. Yet there is no reason naturally for any distinction between the two instruments. The difference has been produced by an accident, that a term of years is deemed personalty, and, therefore not within the Statute of Uses. For the other kinds of personalty various modes of alienation are available, goods and chattels being assignable either by delivery or by deed ; stock by transfer in the books of the Bank of England, or by a delivery of a stock certificate, and shares in a similar manner. The transfer of land differs, therefore, from the transfer of other kinds of property in being much less simple and more costly. The nature of the case is, perhaps, responsible for this to some extent, but from what has been said it may reasonably be assumed that the law relating to the transfer of land might be very much simplified. Testamentary disposition, which comes next in order, does not seem to call for any observations pertinent to the present purpose.

The other class of titles consists of modes of acquisition otherwise than by the intentional alienation of the owner, and includes, therefore, intestate succession, adverse possession, prescription, occupancy, accession, forfeiture, and bankruptcy. The law regarding the first of these, intestate succession, is, according to almost universal agreement, in an unsatisfactory condition. That the whole of an intestate's land should descend to his eldest son alone, while his other property is equally divided amongst his widow and children or next of kin, is certainly anomalous. The desirability of uniformity in the devolution of the property of an intestate has been sufficiently insisted on by another writer in the current volume of this magazine. The expediency of such uniformity will, therefore, be here assumed. The point of peculiar interest for the present purpose is that by assim-

lating the succession to land and to goods and chattels, the only generic difference between the opposed classes of realty and personalty, would be gone. In no other respect can the various subjects of real property be associated together and opposed to the various subjects of personal property than in the descent of the former to an heir, the devolution of the latter to an administrator for the benefit of the next of kin. Were the distinction in question gone there would be no common mark to distinguish the subjects of the one class from the subjects of the other. The establishment of a uniform mode of succession may be advocated, therefore, as a means towards getting rid of this distinction between realty and personalty as well as on the ground of its moral expediency. The confusion and complexity which this division of property into real and personal has occasioned throughout the whole system of property have been already pointed out. The advantage which the system would gain from the extirpation of the distinction would be enormous.

With regard also to acquisition by lapse of time might the law be much simplified. It is at present divided into two distinct departments, regulated by distinct Acts of Parliament and founded on different principles. The Statutes of Limitation provide for the acquisition of rights of property in one way, the Prescription Act for the establishment of servitudes in another. Under the former, a right is not acquired directly and positively, but indirectly by means of a prohibition on the owner of land possessed adversely to bring an action against the possessor after the lapse of a prescribed period. The Prescription Act, on the other hand, establishes a right of servitude directly. It enacts that after user for a specified period a right of servitude shall be acquired. Practically of course a right of property is as firmly established by the lapse of the period after which the possessor cannot be ejected, as is the right of servitude after the period required for prescription, but it would be certainly more reasonable and satisfactory to establish it affirmatively, as by prescription, than by implicating it with procedure, and

making it merely a means of defence. There seems no reason why the principles applicable to the establishment of servitudes might not be applied also to the acquisition of a right of property, and a uniform system created for both. As to the periods required for the acquisition of the respective rights in question, they are very various, and it may in passing be suggested that a little more uniformity might be desirable in this respect also. Another point to be noted is the very unsatisfactory way in which the law on this subject has been brought into its present condition, and the consequent difficulty which has been frequently experienced in ascertaining what the law really is. This has arisen partly from the vagueness of the Acts themselves, and partly from exuberance of judicial interpretation thereon. A striking illustration of this may be found in Shelford's Real Property Statutes, where to the Prescription Act and Statutes of Limitation alone are devoted more than 300 pages of explanation printed in very small type, whereas the Acts themselves take up a few pages only. The whole subject wants a thorough remoulding.

This brief and incomplete examination of some of the principal parts of the law relating to title concludes the present task. An attempt has been made in this and in the two former articles devoted to a consideration of the terminology and arrangement of the English Law of Property, to point out the objections to which some of the leading terms of this department of the law appear to be open, and some of the defects which in point of arrangement seem to disfigure the system. Possibly there has been more of condemnation of existing terms and distinctions than suggestions for improvement, and the few suggestions which have been made may perhaps appear crude and impracticable. But the object of the writer will have been accomplished if he has succeeded in directing serious attention to the subjects discussed, and of contributing in any degree, however little, to the ventilation which they seem to require.

W. W. A. T.

III.—THE SUMMARY JURISDICTION OF JUSTICES OF THE PEACE.

IN the year 1871 the present Lord Chancellor introduced in the House of Lords a Bill for regulating the procedure before Justices of the Peace. That Bill being comprehensive and important, but technical in its nature, received little attention from the general public, and did not get beyond Committee in the House of Lords. Now that the alleged increase of crimes of violence and brutality has been brought prominently forward, and augmented powers for the punishment of offenders is demanded on behalf of the magistrates, some further alterations and amendments of the law would appear imminent, and the consideration of some of the principal points of Lord Cairns' Bill appears to us to be specially worthy of attention. The object of the Bill was to regulate the procedure and practice of the more than one thousand magistrates and Petty Sessions Courts in England, and to consolidate into one Act the divers laws relating thereto. Since Jervis's Acts, although the duties of the magistrates have been enormously added to by the numerous, and often conflicting, enactments affecting not only the morals but the education and health of the people, while the courts of summary jurisdiction have attached to themselves an increased appreciation by the poor, scarcely anything has been done to lessen unnecessary labour on the part of the magistrates and their clerks (for which unnecessary labour, be it remembered, the public pay), while the more than doubtful system of paying clerks by fees still flourishes, and antiquated formalities occupy the place of useful improvements.

The provisions of the Bill may be stated shortly :—

1. That the summary jurisdiction of Justices under the Criminal Justice and Juvenile Offenders' Acts be extended to cases where the value of the property does not exceed five pounds, including also cases of larceny or embezzlement by

clerks or servants, false pretences, and receiving stolen property, whether the offender plead guilty or not. The principal objections appear to us on this proposition to be, that the law of false pretences and receiving is so full of doubt and difficulty that its administration should still be left to a jury, assisted by the direction of a competent judge, and, therefore, that summary jurisdiction in such cases should only be permitted on a plea of guilty. It would no doubt be desirable to give magistrates power to deal with petty cases of fraud, but practically the offenders would generally acknowledge their offence. Of course magistrates, even if this provision were adopted, would, in cases where the value is no test of the evil disposition of the offender, still commit for trial.

2. That justices should be permitted a discretion, in dealing summarily with cases under the above Acts, even after a former conviction. Let us illustrate, by a frequent case, how such a provision would work advantageously. A sailor meets with some girls; they rob him. The case is clear; they are old thieves, and must therefore, now, be committed for trial. He is bound over to prosecute. On the day of trial he is a thousand miles away, and, there being no prosecutor, the girls are discharged. Time after time the same girls are charged in some districts of the metropolis, invariably with this result. An occasional memorandum from the Home Secretary would remind magistrates not to deal with cases of hardened offenders, unless otherwise they would escape with impunity.

3. That prisoners should be allowed to plead to charges before depositions are taken. This would save valuable time wasted in taking formal depositions, which now only add to the waste paper in the office of the Clerk of the Peace.

4. That the service of summonses may be proved by affidavit, that they may be served at the last known place of business, and that witness summonses be issued by the clerks to justices, without previous application upon oath.

5. That Justices should have power to enforce the attendance of witnesses living beyond their jurisdiction, and that warrants should be executed in any part of England without being backed.

6. Justices to have power to order costs against defendants bound over in sureties, and to bind over either party, or both parties, in cases of assault on breach of the peace, although no one has applied that sureties should be required. Recognizances to be entered into before the clerks, and be recoverable as penalties. This last proviso has been worked in the metropolis, under the local Act, with great success.

7. Clerks to Justices to be enabled to issue notices for convening special sessions, authenticated by an official seal.

8. A record of convictions to be kept in each petty sessional division, and that a record, or certified extract therefrom, be deemed sufficient evidence—(combined, we presume, with identification of the accused). Now, that the principle of commulative punishment, so long contended for by that well-known magistrate, Mr. Barwick Baker, is coming slowly, but surely into practice; the importance of this last provision is obvious. The farce of a constant offender who is well known in the small country town, and whose every offence is in every one's memory, putting the country to the expense and trouble on each occasion of proving a former conviction, is almost played out. Let us remind our readers what it involves. Clerk's time, filling up a long-winded form full of absurd technicalities, the signing and sealing by the Justices, a journey of a clerk or constable with this valuable conviction to the office of the Clerk of the Peace some miles off, the copying by a clerk, countersigning by the Clerk of the Peace, and lastly the production before the Justice of a document which does not give him half the information he already possesses in the books of his court. In the Metropolitan Police Courts it is well known that under the present system few convictions are returned owing to the insufficiency of the staff of clerks.

8. Power to be given to a magistrate, or clerk in his

absence, to adjourn any sessions or remand. This power should, it appears to us, be scarcely entrusted to the clerk, unless he be also empowered to receive an affidavit justifying the necessity. Justices to have power to award portions of penalties as compensation to parties aggrieved.

10. Persons found drunk to be apprehended without warrant.

11. Justices' Clerks to be paid by salary and to act as public prosecutors. The existence of the fee system so long is a proof of the little attention paid by the public at large, to the continuation of an evil of the greatest magnitude, and which would seem to pollute the very fountain of justice.

12. The consolidation into one Act of all matters relating to procedure before Justices.

These were the main provisions of the Lord Chancellor's Bill, and with their general object, we apprehend, few readers will quarrel. But we hear it suggested that in the event of the matter coming before Parliament there will be a movement, to give magistrates powers to imprison offenders on summary conviction of offences of violence and other crimes, for much longer periods than heretofore. We trust this will not be so. The power of inflicting long sentences should be most carefully conferred. Let it be remembered that although a single judge has the power, still he is, to some extent, kept in check by the importance of his office, the presence of his brethren of the bar, and an ever watchful press. An intemperate or popularity-seeking magistrate would often have no such restraints, and might act upon the principle of the Justice mentioned by Sir George Stephen, who made an order of affiliation, condemning a plough boy to pay half-a-crown a-week, for an eleven months' child, on the ground that, because the man was a poacher, "it would be a useful example." If the sessions were as frequent as they should be there could be no necessity for cases of great brutality being kept from them. Lord Brougham, on the 23rd March,

1855, in a touching speech, bequeathed the following proposals to his brethren and his country before he should have sunk into feeble, and unreasoning age :—

That Assizes should be holden four times a year in each county, and Quarter Sessions so frequently, and at such times relating to the Assizes, as that a Court of Criminal Jurisdiction shall sit once a fortnight in each county.

That to equalize the business, counties may be divided and parts of different counties united, for the purposes of trial, and that persons may be tried, at the option of the public prosecutor, either in the district where the offence is alleged to have been committed, or in the adjoining district.

That the same criminal jurisdiction should be given to Judges of the County Courts as is at present possessed by the Quarter Sessions of the Peace, that this jurisdiction should extend over the district subject to their civil jurisdiction, and that the Justices of every county may be relieved from the obligation to hold Sessions oftener than four times a year, whensoever it shall appear; that beside those four Sessions and the Assizes, there is a sufficient number of County Court Criminal Sittings to give two Criminal Courts monthly in the district.

We cannot but think that in any amendment of the Criminal Law some reconsideration of the treatment of juvenile offenders would be very desirable. Perhaps one of the most painful scenes in a magistrate's court, none the less painful from the incongruity, if not grotesqueness, of the magnitude of the charge and the insignificance of the criminals, is when some three or four lads under nine years of age are accused, with all due formality and circumlocution, with sacrilegiously breaking and entering, or burglariously, as the case may be, a certain place, and stealing therein, possibly, the sum of ninepence halfpenny, which it is subsequently proved they did feloniously spend in sweetstuff, dividing it with accomplices after the fact. Formal depositions are taken, the urchins are cautioned in a long form not to say anything, which caution, as their entire attention has

been absorbed with the contemplation of the Royal Arms, they duly observe, and then, after some other forms, they are duly committed for trial. At the Assizes an indictment is prepared, learned counsel are instructed to prosecute, and the parents, by selling their "homes," instruct a barrister for the defence of offenders who cannot understand the crime for which, if convicted, they must bear the stain of felons for life. From thence, through the purifying trial of a month's detention in a common gaol, the children are at last sent to school. Such is our treatment of the young Hopeless of society. Had it been young Hopeful, who broke open his mamma's sideboard, or stole the neighbours' apples, would he, the child of a gentleman, be taken before a magistrate? No. He would be confined to his room, perhaps flogged (although the experience of prison officers is, flogging acts as no deterrent to young thieves) and perhaps he might be sent to a more careful school and placed under stricter discipline. And is not this, we would ask, better for him and for the community? His future prospects would not be destroyed. He would not graduate with older criminals. A life of usefulness would thus be saved to the State, ignoring the costs of the prosecution. There is not one law for the rich and another for the poor, but there are two practices.

Deal with men as men, and with children as children, we would say. Let every young offender for any first offence, except perhaps murder or similar heinous crimes, be punishable by summary conviction before a magistrate and be liable to be sent to a school of discipline, or to an Industrial or Reformatory School. The school of discipline should be in fact a child's prison, but a prison with the best and most strict reformatory rules. The expenses of the child at the school might well be borne by the parish to which he belonged, as it would be from the neglect of education in all probability, that the child had become criminal. The school of discipline should not interfere with industrial schools, the discipline would be much sterner, while the period of detention, as a general rule, should be much shorter.

The punishment would be, of those advocated by Bentham (Vol. I. p. 404) which are calculated to weaken the seductive, and to strengthen the preserving motives, and which have an advantage over all others, with respect to those offences to which they can be applied. There are other punishments which have an opposite tendency, and which serve to render those who undergo them still more vicious. "Punishments which are considered infamous are extremely dangerous in this respect, particularly when applied to slight offences, and to juvenile offenders." Half the felons in the docks at the police courts are juvenile offenders, whom we are convinced would be much better dealt with by the schoolmaster than the Magistrate and the Prison Governor. "To extirpate crime is the function of the State, and its urgent duty: and if it can extirpate crime only, by reforming and instructing criminals, what principles of economic or moral science can be pleaded in bar of its adopting the only means of doing what ought to be done?" *

Compulsory education is certainly working a great reformation. Parents are learning that *they* are responsible for their children, and are gradually giving up the old and convenient belief, that it is the duty of the policeman and the parson, in short, any body's but theirs to see to the moral training of their children. The result is that children begin to attend school regularly, and there are fewer young vagrants or professional thieves. The great difficulty is with children whose fathers and mothers both go to work. The parents pay the school fees, and *tell* the children to attend school. The children do not go, the father is fined, and the children are beaten. This does not make boys and girls any more regular in their attendance. In New York officers of the sanitary police call at the schools, ascertain who are absent, and whether the parents are aware of it. If the officers catch the children they take them to school. If the children become habitual absentees after this, they are apprehended and sent to an Industrial School. We

* Edinburgh Review, Vol. 101. p. 401.

have yet in England to find a means of punishing children as well as parents, and it may be questioned whether a few days in a school of discipline with its severe training would not make a child appreciate the more mild and genial teaching of our public elementary schools.

It not infrequently happens that witnesses who inform the police immediately on the commission of an offence, will give no further information subsequently. Considering the inconvenience to which witnesses are subjected at our criminal courts, the utter want of accommodation for decent women or respectable men, and the miserable remuneration granted for loss of time, the reluctance is not surprising. Still we think the difficulty might be lessened if police constables were permitted, as in Edinburgh, to serve witnesses with notices which have the force of summonses, and with which each officer is always provided. We believe also that the police in that city can give notice to small misdemeanants, under the local Act, to attend the police court without any summons from the judge of the court.

While it would be very undesirable wholly to abolish the grand jury system, especially in political offences, yet the plan suggested in the Metropolitan Police Bill, 1839, would in large towns where there are stipendiary magistrates, considerably lessen the duties of grand jurors. It was proposed that the committing magistrate should certify that he had carefully inquired into the case, and that in his opinion it was a fit case to go to a jury, and that this certificate should have the same effect as the finding the bill by the grand jury. Any objection to this course might be removed by permitting the accused to be allowed the opportunity of going before the grand jury upon his application being granted by a judge in chambers, as in bail cases.

Frauds in trade should be made the subject of special enactment, and adulteration, false trade marks, selling goods unfit for food, and fraudulent description of goods should be placed on one footing as misdemeanours.

Appeals from the decisions of magistrates should, it ap-

pears to us, be more frequently permitted. "No precautions against the abuse of power can be too strict, or too many that do not impede the use of it: and these or whatever precautions may be taken, are taken not against this or that individual but against human nature."* Upon grounds such as these, no magistrate should object to the defendant having an opportunity of appeal in any case. In these days, when every small case may be reported in the public press, the amount of the penalty is not so much felt, as the publicity. A restriction, therefore, which will not permit a defendant to appeal because he has not been fined more than two pounds may be an utter denial of justice, and the mere will of one magistrate, utterly unjustified by law, may affix an indelible stigma on an innocent man.

The obsolete system of requiring that the prosecution of brothels and disorderly houses should be undertaken by the parishes should at once be amended. These prosecutions should be handed over to the police, and the offenders be punishable on summary conviction. This is no new suggestion. "The difficulty and expense of indicting these houses (said the Third Report of the Committee of the House of Commons on the Police of the Metropolis, 1818) and the impediments in the way of discovering the real occupiers, have frequently deterred the parish officers from proceeding against them; and even when they have obtained a verdict the same profligate conduct has been carried on under different names in the very same house. Your committee have to suggest a more summary mode of procedure."

While, on the subject of procedure, it would be well that any new legislation should give distinct directness as to the manner of taking depositions. The evils of the present system have been well exposed by Sir George Stephen, in his letter on "Magisterial Reform," addressed to Lord Palmerston, in 1854.

"Never yet," he says, "have I been able to enforce the rule of taking down examinations and cross-examinations

* Bentham, Vol. x. p. 388.

word for word, though clearly intended by the Act, and often desired by the judge of Assize. In taking evidence, where no attorney is retained, it is the rule, and not the exception, to put leading questions, less, perhaps, because the magistrate is unconscious of the irregularity, than to make short work of the case."

A considerable amount of labour might fairly be saved by the adoption in the Schedule of the Act of the very shortest form of summonses, commitments, convictions, and other processes of the courts. No business man would think it necessary, in one document, to give the name of a person seven or eight times over. Yet this is frequently done in commitments. In the Metropolitan Police Act permission has been given to state informations shortly, and to use abbreviated forms.

We have offered these somewhat disjointed remarks to our readers, more as suggestions than with the view of forming any scheme of a complete code of procedure. That a comprehensive enactment is most desirable, all practical men will agree, and we trust that before the close of the ensuing Session some steps nearer to that end will be attained.

A. H. S.

IV.—REFORM AND CODIFICATION OF THE LAW OF NATIONS.

THE following report of the proceedings of the Association for the formation of a Code of Law and Procedure for all Nations, was read in the Jurisprudence Department of the Glasgow Congress, by MR. THOMAS WEBSTER, Q.C.

The Jurisprudence Department of the Social Science Association includes amongst its objects the Amendment and Codification of the Law of Nations. The subject of such codification has from time to time been brought before the

Association, in the addresses of its president Lord Brougham, and by various persons on other occasions.

At the Manchester Congress, in 1866, Mr. David Dudley Field suggested the appointment of a Committee to prepare a report on the outlines of an International Code with the view of having formed after careful revision and amendment, a complete code, to be presented to different Governments in the hope of its receiving their sanction. A Committee was accordingly appointed consisting of jurists of different nations. The separation and distances of the members of the committee from each other made it difficult for them to take note of each "progress," to interchange with advantage their respective contributions for revision previous to a general meeting; but the proposer of the Committee, Mr. David Dudley Field, submitted to the Congress of the Association at Norwich, in 1873, "Draft outlines of an International Code," as his contribution to the general design. The outlines so submitted embraced not only a codification of existing rules constituting the Law of Nations, but contained suggestions of such modifications and improvements as the more matured civilization of the present age requires.

In the course of 1873 two Associations were formed, the one, the "Ghent Institute of International Law," held its first meeting at Ghent; the other, the "Association for the Reform and Codification of the Law of Nations," held its first meeting at Brussels, in the autumn of that year. The Institute of Ghent is limited to 50 members, men of eminence in special departments and well qualified to interpret the law; the Association assigns no limit to the number of its members: it consists of jurists, legislators, and publicists, and others taking an interest in the Law of Nations, public and private. The objects of the two Societies bear a relation to each somewhat similar to the relations of the Juridical and Law Amendment Societies, meeting in London.

The two Societies held conferences at Geneva, in the autumn of the present year; the Institute of Ghent was occupied principally in discussing the three Rules of Wash-

ington; and the Association, in receiving and discussing papers bearing on Arbitration and the Codification of the Law of Nations, with a view to the extinction of the conflict of laws.

The Association passed a resolution to the effect, that the "Draft Outlines of an International Code," already referred to, a translation of which, in Italian, was presented to the Conference, should be dealt with in sections, by being submitted to competent persons for examination, revision, and addition, with a view to the formation of a complete Code. The Council of this Association has passed, at this Congress, a resolution to the same effect. It may then be hoped that by the united action and co-operation of competent persons some progress may be made towards the great end in view. Let it ever be borne in mind that any successful effort in this direction is in the interest of peace, that the assimilation of law and procedure and the extinction of the conflict of laws is one step towards the realization of the idea of the unity of mankind to which history and progress point: not a unity breaking down the limits and levelling the distinctions between the different nations of the earth, but a unity founded on, and as it were, the result of their natural varieties.

The foundation of such unity is the recognition of the absolute equality of nations and of persons, not in respect of position or physical or intellectual power, but in respect of the recognition of those duties, claims and rights on which civilization is based. In illustration of the way in which it is proposed to proceed, it may be mentioned that at the Geneva Conference communications were read, and discussions took place on the assimilation of Law and Procedure, and the extinction of the conflict of the Law of Nations in respect of property in intellectual labour and contracts, bills of exchange, and other negotiable instruments, subjects having no nationality, but of world-wide interest. The claims of the author of a book or other product in literature, or the fine arts, a painting, a picture, or sculpture, is personal and individual, and should be recognized as property through-

out the civilized world. The United Kingdom has set a noble example of giving this copyright throughout the whole of the British Dominions to an alien without regard to nationality, provided there be first publication in some part of the United Kingdom.

It is hoped and believed that this example will not be lost on our brethren across the Atlantic, who were represented in great numbers at the Vienna Patent Congress, at the Brussels Conference in 1873, and at the recent Geneva Conference ; some of whom are present here, and several others of whom would have been present had the meeting of the Association been one week earlier. On the occasions referred to they one and all declared that they hoped the anomaly as regard copyright to alien authors would cease ere long, and they pledged themselves to use their influence towards such an end. Conventions and treaties resulting in international copyright have hitherto been founded on the principle of reciprocity ; let this condition be extinguished from our legislation ; let there be a generous recognition of the claims and rights of all in respect of matters not local, without regard to nationality.

The observations made with respect to intellectual labour apply to all those transactions which intercourse and commercial relations have forced on mankind. Railways, steamers, telegraphs, postal arrangements, and free trade, are changing the conditions and relations of intercourse and enterprise throughout the whole world.

Let law and procedure be adapted to the inevitable necessity, to the indications of evidence as to the unity of mankind.

In other subjects, as money, weights, and measures, an approach may be made to uniformity by an Assimilation of Law.

Why should not an attempt be made to abolish the distinctions between the laws of different parts of the United Kingdom ? Why should the law as to commercial contracts be different in Glasgow and in London ? Why should that

most important of all, the marriage contract, present such a conflict of law and procedure? England has learnt something from Scotland in education and police, and may learn something in the much agitated question of a public prosecutor, and in other matters.

In conclusion, attention should be directed to the terms to be employed in the proposed code. The expression "Law of Nations" includes those rules, a system in fact, having no legislature to enact its decrees, no judiciary to interpret its decisions, no executive to enforce its sanctions. Is it, then, a chimera, a fiction, a mere phrase? Most assuredly not. The universal assent of the civilized world attests its reality. The conscience in the individual has its counterpart in the nation; there is a conception of rights and duties between different nations as between subjects or citizens of the same nation or state. International law, in the proper sense of the term, assumes some assent, contract, or understanding between two nations, as in the case of copyright, extradition treaties, postal and telegraph arrangements. It is not unusually designated as public and private. The expression private International Law is productive of much confusion.

It is suggested that, in lieu of private International Law, the term "Municipal Law of Nations" should be adopted. Such law is the subject of positive enactment or of the Common Law. Its assimilation is a practicable measure whereby the extinction of the *conflict of laws*, to adopt the term of that eminent judge of the United States, the late Mr. Justice Story, may step by step be accomplished. The author of this report is responsible for the contents, but it had received the concurrence of Mr. D. Dudley Field, Sir Travers Twiss, Judge Peabody of the United States, Dr. Thompson of Berlin, and other members of the Geneva Conference; the three persons last named being present at this Congress.

V.—STIPENDIARY MAGISTRATES.

FROM a return delivered to the House of Commons, of all places in England and Wales having Stipendiary Magistrates, it would appear that the experiment, after many years' trial, is, practically, a failure. The preamble to the 26 and 27 Victoria, c. 97, enabling cities, towns, and boroughs of twenty-five thousand inhabitants and upwards to appoint stipendiary magistrates, states, that the execution of the office of Justice of the Peace within populous cities and places had become difficult and burdensome, on account, not only of the great and increasing population, but because of the difficult and important legal questions that arise; and further that there was good reason to believe that these cities and places would secure the services of stipendiary magistrates, being barristers of five years' standing, for the more speedy and effectual execution of the office of magistrate, the better protection of the persons and properties of the inhabitants, and the advantage to the public. An Act of Parliament could hardly have been introduced with fairer words, or apparently with greater show of necessity. Yet, what is the result? The cities, towns, and boroughs, who were yearning to avail themselves of the talent of the legal profession, and whose magistrates had found their office too difficult and burdensome, amount in all to *six*, including the *quasi* metropolitan and government towns of Chatham and Sheerness. There had been previous to 1863, nine stipendiary magistrates appointed under the provisions of the 5 and 6 Will. IV, c. 76, s. 99, at salaries from £1,500 to £300, and the 2 and 3 Vic. c. 71, had enacted that twenty-seven magistrates might be appointed to the metropolis, which would include suburban districts now under Justices of the Peace. We find in the result, however, only twenty-three magistrates in the metropolis with no area of jurisdiction extended since their first appointment. We are, therefore, justified in concluding that the stipendiary magistrates

system is *not* a success, and we shall endeavour in the following pages to ascertain the cause.

Public attention was in the early part of the century drawn by Fielding, Colquhoun, and other writers, to the defects in our police and magistracy, more especially within the metropolis. Committee after Committee of the House of Commons enquired into the subject, and finally, in 1838, a Select Committee reported that it was expedient "for the future to enable one justice (of the metropolis) to execute within the jurisdiction of the Act, all duties now requiring the concurrence of two magistrates;" and they fortified their opinion by quoting a dictum of Bentham's that "one judge under the auspices of publicity is beyond all comparison preferable to any greater number." In 1825 there were thirty paid magistrates within the metropolis, and increased salaries were granted them by the House on the condition that for the future stipendiary magistrates should be barristers. It had latterly been the custom for the Government to appoint barristers, but it was found that the then existing salaries were insufficient to tempt any but "those who could not (as Mr. Secretary Peel said) succeed in their profession—the refuse of the bar." The suggestion that a stipendiary magistrate must of necessity be a barrister, received considerable opposition at the time from Bentham. In some observations on Peel's speech, he says:—

"Now, for his two ministerial remedies in aid of the £200 a year Parliamentary one. 1. Exclusion of all but barristers. 2. Exclusion of all barristers except three year old ones. Problem which his rhetoric or his logic, or what is sometimes more powerful than both, his silence has undertaken the solution of——how to prove that by these two exclusions added to the £200 a-year appropriate aptitude, moral, intellectual, and active, adequate to the situation, together with adequate plentitude of attendance, will be produced. By this policy he secures to this class of his protégés, the aptitude proved by the right to the name of *barrister*. Now, then, what are the qualifications, the sole qualifications, of the possession of

which any proof whatever is given by the right to bear this name? Answer: Being of full age, payment of a certain sum in fees and taxes; and on a certain number of days, sprinkled over a surface of five years, eating and drinking in a certain place, or therein making believe to eat and drink. As if this security was not strong enough, now mounts another upon the shoulders of it. After five years employed in the above exercises, then comes a repose of three years more: for not less indeed than these three years more must this class of the right honourable gentleman's protégés have borne the name of *barrister*, but as to the exercises of eating and drinking if it be agreeable to the gentleman to perform them, he is no longer burthened with any limitation in regard to place. The right honourable minister, in the pathetic part of his speech, asks a question. May logic in the person of an obscure individual be permitted to do the like? Comparatively speaking (for I mean nothing more—service for five years, the usual time) as clerk to an attorney, would it not be a security, though not so dignified, somewhat more efficient? The clerk could not be altogether ignorant of the law without his master suffering for it. The master, therefore, has some interest in causing him to learn it—the clerk in learning it. To render a barrister an object of his choice three years must be his length of standing. Now, then, of the number three thus applied, what was the design? To extend the number of admissible candidates or to narrow it? The too young, or the too old—for the exclusion of which of these unapt classes was it intended? The too young, says the wording, abstractedly considered, the too old, says the word *refuse*, and the sort of argument conveyed by it. For, these are they, who, by their willingness to accept of so low a price as the £600, have given the requisite proof of inaptitude of their despair of barrister business, and consequently for their inaptitude for the office of police magistrate. Turn now to the three year olds. In the breasts of all this blooming youth, no such self-condemning and inaptitude proving despair can have had time to form itself. The pro-

bability is they have had no experience worthy of mentioning, and to these men is to belong the exclusive chance of being chosen for the office."

These and such remarks as these were at that time freely bandied about by those who were adverse to the stipendiary magistrate, and they have been repeated with variations ever since. The Bar, on the other hand, has had its defenders. Sir George Stephen objects that the unpaid magistracy are not only ignorant of the law, but of legal principles. "Points are often raised before a bench, not a member of which has ever read a law book in his life, or acquired Latin enough to understand its phraseology." Even the simplest rules of practice regulating the order of proceeding are sometimes beyond their comprehension, or if they do comprehend them, are arbitrarily set aside as inconvenient. They are uncertain in their attendance, keep the public waiting, and cannot get on without the assistance of the clerk, a professional man who is interested by fees in obtaining convictions. They have also an especial horror of and hatred to poachers. Such are the charges combined with the cry of "Justices' Justice," which are hurled at the unpaid magistracy. We all know well enough that each side overstates the truth, that some of the ablest magistrates both of the paid or unpaid bench are members of the Bar, while the devotion to their duty and the thorough knowledge both of law and practice of their courts, possessed by many lay justices of the peace, are not excelled by any member of the Bar.

We believe that one of the principal reasons why the stipendiary magistrates are not more numerous, is from a mistaken economy on the part of the town councils. It cannot be expected that any member of the Bar, with a fair and reasonable chance of success in his profession, would accept an appointment of £600 a-year, or even £300, which would absolutely shelve him for life: while the necessary dignity, command of temper, tact, and knowledge of the world, which are so especially necessary to a stipendiary magistrate, could scarcely be expected of a youth of five years'

standing at the Bar. There is in fact no supply of suitable material at the price offered.

This being so, we cannot be astonished at a claim lately put forward on behalf of clerks to magistrates to what they may fairly conceive to be their natural promotion. They are educated men, being either solicitors, or clerks who have satisfied the Civil Service Commissioners by competitive examinations. They acquire, by constant attendance at the courts, a thorough knowledge of law and practice, yet they cannot receive promotion because they are not barristers—they cannot become barristers because they are clerks of the magistrates, however otherwise eligible by birth, position, and education. While in every trade of life, in the professions, in every grade but theirs, promotion is given to the skilled workman, to them it is denied by a simple trades' union rule of the Bar. The sums paid to the magistrates' clerks in many large towns in fees, would be sufficient to provide ample funds both for the clerk and for a stipendiary magistrate, especially if the latter were selected from the clerical body. The clerks might first pass through a grade as assistant magistrates, and then be on a par with counsel for selection for the post of magistrate.

We have now rapidly glanced at the rival claimants to the office of magistrate. There can be no doubt that the stipendiary magistracy system might be greatly extended without cost to the boroughs which adopt it. The facility with which business can be done at all hours would tend to increase the fees of the courts, and the amount should be sufficient to pay the expenses, while there is no reason that the magistrate should not perform the duties of coroner upon the system pursued by Sheriffs fiscal in Scotland.

OMEGA

VI.—INTERNATIONAL COURTS OF ARBITRATION.

By THOMAS BALCH, author of "*Les Français en Amérique*," "*Les Crises Financières*," et "*les Chemins de fer Américains*," etc.

TEN years ago, the grave questions involved in the escape of the *Alabama* and her subsequent depredations were the subject of much thought and anxiety, and many were the suggestions made by the friends of peace, as to a possible disposition of the controversy without resort to war. The situation had no encouraging aspect. Indeed, it is difficult to realize to-day how very hostile and angry were the two parties. The attitude assumed throughout by the English government was such as to preclude apparently any hope of adjustment, and the American Minister at London was obliged to content himself at least with merely sending in a fresh claim for damages in a stereotyped phraseology. As the war for secession approached its close, the Americans began to realize somewhat the enormous losses attendant upon it, not the least of which was the absolute destruction of their commerce. The temper of the people was thoroughly roused, and any hostile demonstration at Washington would have met with a hearty and unanimous response throughout the country. President Lincoln not only remained calm himself, but wisely calmed as far as he could the popular excitement.

The most common method of settling national disputes, in modern times, where resort was had to arbitration, had been a reference to a monarch selected by the contending parties. But this plan was open to serious objections. Experience had disclosed that sovereigns were not free from the weaknesses of less exalted persons, and that prince and peasant alike, when once appointed sole arbiter, cannot resist man's innate tendency to find some award which will "split the difference," and which usually leaves the re-

spective disputants equally dissatisfied. The United States had refused to accept such an award some years previously. A similar experience would have merely further exasperated a contest already sufficiently inflamed and embittered.

Another objection was in the great difficulty of finding a reigning sovereign who would prove acceptable to both parties. Napoleon III. was of a restless, yet dreamy character. He was not a statesman, scarcely even a politician. He was not satisfied with political intrigue, for it was his nature to conspire. In 1859, therefore, obeying in part the behest of his temperament, he undoubtedly held close relations with some of the Southern gentlemen then in Paris, afterwards very prominent in the Confederate Councils. At the time, these relations were more or less matters of surmise or report. Later, they were stated in detail in the "*Indépendance Belge*," in the winter of 1860-61, and were said to have been in substance, that an appeal had been made to the Emperor as head of the French race, on the ground that the larger part of the white inhabitants of Louisiana, of Florida, and South Carolina, and a portion of them in the other States, were of French extraction; that thereupon had been promised to these self-constituted plenipotentiaries an immediate recognition by France and England of the Seceding States, in case the separation was peaceably effected, and a prompt recognition as belligerents in case of an armed struggle.* Some not very obscure intimations were given that at need something more than moral and political support might be relied on. This remarkable communication was doubtless no more than a correcter statement of the reports of the day. At all events it passed, unchallenged, and subsequent events led close observers to believe, that it had been prepared by some one in authority. Not only was the Mexican expedition

* It has been recently stated in the newspapers that the Comte de Paris, in the forthcoming volumes of *La Guerre Civile en Amérique*, will remonstrate that the French and English proclamations to this effect were premature, and contrary to the recognized usages of amical nations.

undertaken, but the Emperor and his ministers were actively at work, meddling, plotting against the American Government, until at last they went so far as to actually invite England and Russia to co-operate with France and insist upon an armistice.*

This mischievous activity was probably of more service than otherwise to the Northern States; but it had in one way or another provoked expressions of opinion from such important personages as von Bismarck, von Beust, Gortschakoff, and others, that it might be fairly said that there did not remain a court which was not in some way so compromised that it was quite impossible to find a royal referee.

Another grave objection to asking a sovereign to act as arbitrator lay in the fact, that a decision in the case of the *Alabama* could not be arrived at without passing in review almost all that part of international law which related to neutrals. A very serious matter indeed, in which the whole world was interested; an occasion which ought to serve for a great and marked progress, and a settlement on a firmer and more just basis of the rules which should govern neutrals and belligerents. The United States had naturally, before their independence was recognized and at all times subsequently, maintained that the evils of a war should fall on the belligerents alone. Neutrals had hardships enough to bear in the commercial disorders and the financial losses consequent upon a serious disturbance of the general peace; therefore, the only possible pretence for the interference of a belligerent with a neutral was that of self-defence, in other words, to prevent the neutral from giving "aid and comfort" to the enemy. They contended that the sea-going vessels

* After these lines were sent to the printers, I received from a friend a cutting from the *New York Express*, Sept. 1, giving an account of an interview between Prince Gortschakoff and the American Minister at St. Petersburg, in which the Russian Chancellor is represented as going even further than is stated in the published Diplomatic Correspondence. The article asserts that in the event of any European interference, the Czar would have aided the Northern States with his fleet then at New York.

of a neutral were entitled to all the immunities and privileges of home waters. The American Government persistently endeavoured by its diplomacy, by the decisions of its judicial tribunals, by resolutions in Congress, by declarations in the messages of its Presidents, to have these just and righteous principles recognized. In fact, it was for this that their last war with Great Britain (1812-15) was fought. The United States, it was supposed, would certainly press for an acceptance of these principles. But it was not likely that England would ever consent to relinquish her own long-cherished interpretation of the "law of the sea." "The coarse dialectics of the older English judges" * had mixed sovereign and belligerent powers; and, inspired by the spirit and precedents of the semi-barbarous times and deeds of Drake and Raleigh, claimed the right to sit in judgment in its own tribunals, according to its own forms of procedure, upon the acts, the rights, the property, and even the liberties of citizens of a neutral state. From its courts, no matter how flagrant the wrong done, "there was no appeal except a diplomatic representation to the king." † It is not surprising, therefore, that the claims of English captors were upheld to the extremest limit possible, nor that many of the decisions of the English maritime tribunals were rank with injustice. Even when the increasing navies of other nations weighed sufficiently upon English statesmen to obtain her assent to the declaration in the Treaty of Paris (April 16, 1856), that an enemy's property on board neutral vessels, and neutral property found in an enemy's vessel, should be free from capture, except contraband of war, yet as, unfortunately, there was no formal definition of what should be considered

Wharton's Criminal Law. Preface to 7th ed. 1874: xviii.

† "Belligerent and Sovereign Rights as regards Neutrals during the War of Secession." Boston, 1858. This is the able and learned argument of the Hon. Wm. Beach Lawrence, in the case of *The Circassian*, before the Commissioners appointed under the 12th Article of the Treaty of Washington, and has much professional weight from the fact that the International Tribunal reversed the decision of the highest American Federal Court, as reported in 2 Wallace's U. S. Court Rep. 185.

contraband of war, British jurists forthwith applied their own narrow interpretation, and maintained that the products of a neutral state, though not directly applicable to warlike uses, but which might incidentally aid or assist a belligerent, were within the meaning of the phrase. It was not therefore probable that, if so much of the old leaven remained there would be any chance of England consenting to appear before a sovereign and submit to his award.

Those who strove and yearned for a peaceable solution of these grave questions neither adandoned hope nor allowed themselves to be disheartened. Mr. Cobden wrote to me from Midhurst, March 12, 1865: "I have great faith in the aggregate intelligence of your country whenever its attention is forced by adverse circumstances to a serious study of politics. When the war is over you will have a great financial difficulty to deal with. . . . But you will soon surmount all these follies when the nation finds itself in the school of adversity." These words are the more noteworthy in that they were written but a few days before his lamented death.

Other modes of adjustment were suggested and discussed. Precedents were sought for and examined, and the research disclosed such various schemes, almost stratagems, for settling disputes without recourse to war, that one was tempted to assert that a philosophy directly the reverse to that upheld by the author of "*Leviathan*" was more in consonance with the nature of man.* After mature reflection a Court of Arbitration was proposed to various jurists who took an interest in the matter, in substance that developed in the following letter.

In November, 1864, during a short visit to America, it happened to me to mention the proposed Court of Arbitration to President Lincoln. He observed that the idea was a good one in the abstract, but that in the then temper of the American people it was neither possible nor popular. In

* *Libertas*. Molesworth's ed., 1839, ii. 157 *et seq.*

fact, as he quaintly expressed it, we were not near enough to the millennium for such methods of settling international quarrels. Still, he thought the idea worth airing.

A draft outline of the proposed court of arbitration was refused by more than one editor; but at last Mr. Greeley, who feared no unpopularity where a cause was, as he thought, entitled to a hearing, gave it a place in the columns of the *New York Tribune*, March 18th, 1865. The letter was addressed to the able and conscientious correspondent of that journal at Paris, Mr. W. H. Huntington, and was as follows:—

PARIS, March 3rd, 1865.

MY DEAR SIR,—You asked me to put in writing the observations which I made to you yesterday touching the outstanding questions between England and the United States. I should be sorry to make you read all that you so kindly listened to. It would be to tax you rather too severely, But the current of my remarks was to this effect:

I. That both England and the United States preferred claims which, if not judiciously managed, might and perhaps would lead to war.

II. That the American claims were chiefly the depredations of the Alabama, whilst it seemed from the tenor of Mr. Layard's recent speech, that the British claims were also such as to rest upon questions of law. Neither set of claims was strictly national; they were rather those of individuals, merchants, ship-owners, and others.

III. That as to such claims, war was a barbarous manner of enforcing them; that the most successful war would after all be a most expensive and unsatisfactory process of litigation; and that the civilized and Christian way of ascertaining their validity and extent should be by arbitration.

IV. That the best manner of composing such a court of arbitration would be, that each party should select some competent jurist, those two to select an umpire. The claims to be presented, proved, and argued before this Court, whose decisions should be final and without appeal.

V. That such a proposition, proceeding from our Government, would, without doubt, receive the countenance and support of all intelligent Englishmen. It is true, that some of the speeches recently made in Parliament about us and Canada are of a nature to discourage such expectations. On the other hand, it must be borne in mind, that these gentlemen form a class apart; that it is their political faith to

believe and say unseemly things of Republican institutions, of the men, habits of life, and principles of action developed under them. But it was long ago that the wisest of men gave us the measure of such people, and the experience of mankind has confirmed his judgment.

VI. Such a proposition from our Government would at once quiet all the foolish alarms which have, or appear to have, taken possession of so many persons in England. It would also uphold and strengthen all the advocates of progress. It would give greater force to their arguments in favour of just reforms and liberty; and this, not only in Great Britain, but throughout Europe. The abandonment of the old system of arbitration by a reference to a Sovereign, more or less unfit from the very nature of his position, and the introduction of a tribunal, almost republican in its character, whose decisions would have a weight as precedents, an authority heretofore unknown as expositions of International Law, would be no trifling events in the march of Democratic Freedom.

VII. Such a proposition would also be in accord with our traditional policy of peace and good-will towards men.

The most serious objection that has been urged, so far as I have heard, against such a Court of Arbitration, is the difficulty of finding gentlemen not already biased by their feelings or in some way committed in their opinions.

The objection applies, however, in a measure to all human tribunals; it would apply to arbitration by a sovereign, and would leave us no solution other than the dread arbitrament of war. For myself, I cannot believe that there are not to be had in England and America gentlemen of the requisite learning, experience, and impartiality for a position so dignified and useful. At all events, there are many eminent men in Europe in every way qualified for this high duty. I have in my mind's eye a Swiss publicist,* who, after having filled the most responsible stations at home, is now worthily representing his people in their most important diplomatic post. The decisions rendered by him and gentlemen like him would be such as two great and free nations could accept with satisfaction. I dare say he has friendly feelings towards the Republic, but he cannot be wanting in like sentiments for the old Champion of liberty. The preferences of such enlightened statesmen could not possibly be of a

* I may now say that this referred to that most worthy, high-minded gentleman, Dr. Kern, formerly President of the Federal Council, but then Minister to France.

character to influence their judgment, and the parties most interested might well be content to abide their award.

Believe me, my dear Sir, yours sincerely,

THOMAS BALCH.

The publication of this letter proved very conclusively that whatever might be the merits of the proposed court of arbitration it certainly was not popular in the United States. Two years later the accomplished editor of "*Social Science*," Mr. Westlake,* was induced by an English jurist, for whose opinion he had great respect, to reprint it in that periodical, March 15, 1867, and spoke of it as an "important letter," but made no further comment. Nevertheless the idea was well received by such men as Laboulaye, Henri Moreau, and other members of the *Société de la Législation Comparée*, in France; by von Holtzendorff, Kapp, and other honoured publicists in Germany. That the letter in which the plan was originally sketched out should be lost sight of was quite natural and usual. I know of no more affecting picture of the *sic vos, non vobis*, haps and mishaps of literary life than that traced by Bluntschli in his Introduction to his Code of Belligerent Laws,† where he tells how the men, who propounded or elaborated some great governing principle of International Law, have in the course of time been as absolutely forgotten as the skilful but obscure workman who converts the dingy pebble into the brilliant gem. The proposed tribunal was, however, made the subject of some articles and two or three prelections. Discussion gave it vitality. It grew in favour, was considered plausible, then feasible, and finally took a visible form and shape in the Treaty of Washington.

It is not within the purview of these observations to discuss at large the provisions of that Treaty. The Three Rules are so obnoxious to numerous and serious objections

* This is a mistake, Mr. Westlake never was editor of the journal, "*Social Science*."

† *Le Droit International Codifié*, par M. Bluntschli, translated by Mr. Lardy, Secretary to the Swiss Legation, Paris, 1870.

that it is much to be hoped in the interest of neutrals and honest people generally, that the United States and England will disagree so permanently and effectually as to their construction and meaning as to have nothing more said or heard of them except the just and severe criticism and condemnation which they will probably receive from the distinguished jurists who are soon to meet in Geneva. Had the synod of diplomatists who framed these obscurely expressed rules profited by the occasion to overthrow some of the barbarisms still upheld, and, for example, joined in adopting as a principle of law the decision of the Supreme Court at Berlin, "that every contract for introducing contraband goods into a friendly state is contrary to law and morals,"* they would have rendered a vast service to mankind. Perhaps, also, had Mr. Cobden lived, his counsels might have so far prevailed as to have given to the Treaty as a whole a character and spirit which would have rendered it more acceptable to the English people at large, more auspicious also for the future of peaceable arbitrations of international difficulties. It is not to be overlooked that from time to time ebullitions, both in and out of Parliament, such as the question of Sir Henry Wolfe, the observations of Earl Russell, prove that there still exists a certain uneasiness as to the present as well as the past position of Great Britain in that transaction. A few lines from one of later letters, exhibit the stand-point from which Mr. Cobden regarded the conduct of his own country, and from it we may infer the character which he would have probably endeavoured to impress upon the negotiations:—

" MIDHURST, 3rd January, 1865.

" MY DEAR MR. BALCH,—I was very sorry to miss the opportunity of seeing you in London. There are very many topics on which I should liked to have talked with you. I think it depends entirely on the discretion of your own authorities at Washington to remain at peace with all the world until your civil war is ended. I do not say that you

* *Hoffler*, cited by Lawrence, Com. iii. 101.

have not grievances; but one quarrel at a time, as Mr. Lincoln says, is enough for a nation or an individual.* *With the British Government I do not think, on the whole, you have as much to be angry about as to be grateful for what it has refused to do.*"

Those Americans, who remember the official account given in the *Moniteur* of the visit of Messrs. Osborne and Lindsay to Compiègne, or recall of the letters exchanged between Mr. Thouvenel and Mr. Dayton, and the avowed purposes of the Mexican expedition, will probably concur in the opinion thus expressed by Mr. Cobden.

Whatever the criticisms to which the Treaty may in whole or in parts be open, there remained for the friends of peace and International Arbitration the great, triumphant fact that the Court did meet at Geneva and by its award averted, as far as human probabilities go, an appeal to arms. That the United States and English Commissioners were rather too national and demonstrative, does not seriously militate against such courts, but merely touches the construction of them; and we have a notable proof of their value and integrity in the court of the Mixed Commission which sat at Newport in 1873, to hear and decide upon the English and American claims. In the case of *The Circassian*, already mentioned, Count Corti, the President of the Commission, took it upon himself to overrule the decision of the Supreme Court of the United States, an act of high judicial courage which, apart from its legal bearings, is an omen of great promise, for it proves that men of character will sit in such dignified tribunals and render impartial decisions.

Likewise that the United States has kept the money so promptly and honourably paid does not touch the question of International Arbitration or its desirableness. The prolonged struggle in Congress over the disposition of these funds may be never dishonest or discreditable to the American legislative authorities, but it does not impugn the

* An observation which Mr. Lincoln made to the writer, in the conversation above mentioned.

justice of the decision by which they were placed in the hands of that government in its capacity as a great National Trustee. To present the claims for "indirect" losses may have been an act of audacious chicane which reflected no credit on those who did it; but the tribunal did itself honour, and gave us a valuable precedent by ruling against their admissibility.

The friends of International Courts of Arbitration may, therefore, fairly assert that this mode of settling great national questions have been fully and successfully tried, that thereby it may be considered as having passed into and henceforth forming a distinct part of that uncertain and shapeless mass of decisions and dicta, which we call International Law. Without participating in the visions so grandly developed by Zuinglius,* and so fondly cherished by Grotius, of the good time, a good time to be won only by toil and unremitting efforts,—

" When the war-drums throbbed no longer, and the battle flags
were furled,

In the Parliament of man, in the Federation of the world,†

we may reasonably expect that through such tribunals, through their proceedings and decisions, and not through empirical codes, we may ultimately arrive at some more tangible and better ordered system of International Law; one to which the assent of civilized peoples may be given greatly to the benefit and peace of mankind.

A deep, well-settled conviction that this great advance in human progress is not only imminent, but has already commenced and is assured for the future, makes it incumbent on its advocates to examine carefully and philosophically the various forms in which Courts of Arbitration may be organized, and especially the limits within which their authority may be beneficially exercised. I received not very long since a communication from Professor Lorigier, notable for its calm and magisterial discussion of these

* *Civitas Christiana*.

† Tennyson.

points. As the *New York Tribune* had given light and life to my original letter, it seemed but proper that the observations of this distinguished jurist should appear first in its columns. They were accompanied April 11, 1874, by an article supposed to be from the pen of the chief editor, Mr. Whitelaw Reid, the character and interest of which induce me to reprint it here instead of any introductory remarks of my own.

“LIMITS OF ARBITRATION.”

“About nine years ago, *The Tribune* published a letter from Mr. Thomas Balch, recommending almost precisely the plan of arbitration in the *Alabama* case which, after infinite discussion, was finally adopted and carried out to so satisfactory a conclusion at Geneva. It is in reference to that early communication of Mr. Balch that Professor James Lorimer, the Regius Professor of Public Law and of the Law of Nations, in the University of Edinburgh, has written to him the letter which we print this morning. It is worthy of special attention as the mature utterance of a publicist who, having devoted his life to the study of international law and the theories of international relations, and having been a prominent advocate of arbitration and a constant protestant against the barbarism of war, retains enough of impartial calmness of judgment to recognize the limits which are probably imposed upon the capabilities of arbitration by the conditions of human nature and civilized polity.

“Professor Lorimer expects nothing of arbitration, for instance, in cases where one party is morally incapable of entering rationally into a contract, or physically incapable of enforcing its provisions when made. This excludes most of the fighting which ordinarily falls to the lot of England. It is evident that neither the Emperor Theodore nor the King Coffee-Kalkalli was capable of appreciating any procedure except the one which was put in force against them both. Neither is there any prospect that the civilized world will ever be able to interfere with the progress or the result of civil wars. Professor Lorimer does not state this as his own conclusion, but his references to the Paris Commune and our own war of the Rebellion would lead in that direction. In cases where the real object of a war is to determine the relative strength of two nations, and where an unquestioned supremacy is to be the prize of victory, it is clear that arbitration is hopeless, except by an armed intervention of allied powers too imposing to be resisted. It was, for example,

impossible to prevent the Franco-Prussian conflict. The trivial question of the interview of Benedetti and King William in the garden at Ems, might of course have been arranged in any half-hour's session of a jury of gentlemen. But the genuine, unmanageable question which remained behind, was the one which could not be peacefully settled; that is, whether Prussia or France was the stronger. The field of arbitration seems therefore to be limited to the class of disputes of which the Alabama and the San Juan Boundary questions are specimens. How narrow this field is, may be seen when we reflect that except in case of great popular excitement they would never have been made a pretext for war, and that if this excitement had really existed they could not have been referred to arbitration. The world is yet far from that millennial condition when reason and charity are to exercise a commanding influence upon disputes between nations. The better sense of mankind has come, however, to recognize the irrational character of war, and the advocates of peaceful international tribunals are probably not too sanguine in hoping that the future is theirs. But at present their nearest attainable ideal is the establishment of an international organization of force which shall prevent wars by armed menace. There are many who doubt whether armies will not survive courts of justice, and Mr. Lorimer cogently observes: 'When I hear of a State of which the citizens have become so reasonable and dispassionate as to abolish compulsory jurisdiction and to trust to voluntary arbitration, I shall then begin to have higher hopes of international reason and moderation, and consequently of International Arbitration.' "

The letter from Professor Lorimer, thus spoken of was as follows:—

" I, BRUNTSFIELD CRESCENT, EDINBURGH,
" February 10, 1874.

Considering the interest which is everywhere taken in International Arbitration at present, and more especially with a view to the discussion that will take place at the meeting of the International Institute at Geneva in October, I think it very desirable that you should republish the letter which you addressed to the *New York Tribune* in 1865, adding to it such suggestions as your observation of subsequent events may enable you to offer.

I do not know to what extent that letter, or anything else you said or did, may have led to the negotiation of the Treaty of Washington, by which the threatened war between

our country is believed by many to have been averted ; but certain it is that the letter was a very remarkable anticipation of the treaty which was negotiated six years afterwards. The tribunal which you suggested almost exactly corresponded to that appointed under Article 12 of the Treaty, and even the great tribunal which sat at Geneva under Article 1 was only a fuller realization of your original conception, by a larger infusion of the neutral element than you had contemplated, into the court. In this respect it certainly was an improvement. But for the presence of the neutral judges it is doubtful if the work would have been brought to a successful issue, and I think it very worthy of consideration whether, on all future occasions, the Commissioners ought not to be appointed exclusively from neutrals.

In his introduction to his pamphlet on belligerent and sovereign rights, which contains his very able pleading in the case of *The Circassian*, Mr. W. Beach Lawrence remarks on the want of judicial dignity and impartiality displayed by the Commissioners of both the interested nations, and adds : ' In that tribunal there were three other members, and two of them might, perhaps, without serious inconvenience, have been withdrawn from the bench.' I confess I am much disposed to agree with him. The judges of such a court, as it seems to me, ought all to be neutrals, the belligerents, so to speak, appearing only in their true character as litigants. Whether their judges ought all to be chosen by neutrals is another question. With a view to removing or mitigating the aversion which proud and jealous nations naturally feel to intrusting their honour and their interests to others, it might probably be expedient that each litigant should retain the direct appointment of one member of the court, binding itself not to select him from its own citizens, or from the citizens of any State that was dependent upon it.

But the chief difficulties attending International Arbitration have reference, not to the organization of suitable tribunals, but to the determination of the character of the parties capable of organizing them, and the character of the questions that can be submitted to them. In this country there is a tendency to pooh-pooh arbitration altogether, on the ground of the limited sphere of its possible operation : and to save it from ridicule and vindicate for it the position to which it is really entitled, I do think it very important that we jurists should try whether we cannot eliminate the impossible cases and moderate the expectations of its injudicious advocates. It is very much this task which the Institute proposes to itself in the first instance, and I know no one more able to aid in its accomplishment than yourselves, pri-

vileged as you are to enjoy the society of such jurists as Mr. Lawrence. As I belong to the committee which the Institute has appointed to study the kindred subject of 'The Three Rules,' I shall not be called upon to express my opinion on this subject previous to the meeting, and I shall therefore mention to you now, in a very few words, what has occurred to me :—

First : Arbitration being a contract by which the parties agree to abide by the decision of a third, is possible only between two parties, both of whom possess rational, and, as such, contracting will. This cuts off arbitration between civilized nations and barbarians, because barbarians are incapable of entering into such a contract. Civilized nations could not trust to the decision of the arbitrators whom barbarians might appoint ; and even supposing them to appoint civilized men, civilized nations could not trust to their acceptance of the decision in which their own arbitrators had concurred. If the conduct of civilized nations to barbarians be unjust, it is a form of injustice which may be prevented—as in the case of the slave-trade—by the condemnation and even by the intervention of other civilized nations ; but it cannot be prevented by arbitration.

Second : There are internal as well as external barbarians to whom these observations apply. Arbitration between the Commune of Paris, for example, and the Government of Versailles, would have been as much out of place as between us and the Ashantees, or between a criminal and the public prosecutor.*

Third : Arbitration is inapplicable where the question at issue has reference to the relative value of States—where it is asked, for example, whether their historical position in relation to each other is or is not now their true position. So far as the Franco-German war was a fight for the hegemony of continental Europe, it did not admit of arbitration, for the very obvious reason that that was a question which, if it must be decided, could be decided only by a trial of strength. On the other hand, in so far as the Franco-German war arose from the question whether France was entitled to the boundary of the Rhine, on geographical grounds, or whether Ger-

* It has been suggested to us, by a friend, that there is another and better reason why arbitration between the Commune of Paris and the Government of Versailles would have been out of place, namely, that the dispute between them related to the system of Government to be established in France. It can scarcely be expected that the constitution of a great country shall be determined by foreign arbitration, with the consent of its contending factions ; and, if ever such an event were to happen, it would not be a case of international arbitration.—EDITOR.

many was entitled to Alsace or Lorraine on historical and ethnological grounds, it was a fit subject for arbitration, however difficult it might have been to induce either power to think so. It would, I believe, have been physically possible for Russia, England, America, and Austria combined, to have forced their services as mediators even upon two such formidable combatants as France and Germany, and perhaps they might now prevent the too probable recurrence of war. But even in the most improbable and inconceivable event of their arbitration being accepted, by no decree arbitral could they have produced the facts that resulted from the late war, or could they now anticipate those which may result from another. Arbitration, like judicial action in any other form, can only declare a relation which already exists, whereas war brings about new relations, or at least converts those which existed *in posse* into relations *in esse*. On this ground I fear the Eastern Question too is beyond the reach of arbitration, that question, in its essence, being the question as to whether or not Russia be in reality the preponderating power, and, as such, entitled to give the law to the East of Europe and the West of Asia. Here, however, there is one element favourable to arbitration which did not exist in the case of France and Germany, namely, the willingness of one of the parties, at least (Turkey), to place herself unreservedly in the hands of neutrals. I refrain altogether from offering an opinion as to whether arbitration was, at any time, possible in the relations between Northern and Southern States, previous to, or during the course of your own great civil war, that being a subject on which you are so much more able to form an opinion than I am.

• These three cases, or classes of cases, then, are the only ones I can think of at present that seem to forbid the hope of ever being dealt with by arbitration. They leap over all the ordinary disputes and disagreements of nations, which admit of being measured by pecuniary compensation, or arranged by the exchange or cession of territory, with a view to the rectification of boundary lines and the like. Even within these limits the action of courts composed of neutral arbiters may be extremely useful in removing more speedily and with less irritation than was possible by the arbitration of Sovereigns or by ordinary diplomacy, causes which interrupted international cordiality, and in the end may have led to wars. But it is not out of questions such as these that great wars have generally arisen. I doubt whether you could mention a single war of any importance between two civilized nations that arose substantially out of such a question as the *Alabama* claims; and that question, too,

would, in my opinion, have been settled without war even although it had not been settled by arbitration. It is well that we have been spared the estrangement to which a troublesome course of negotiation, probably extending over years, must inevitably have led, and that we have escaped the still more fatal consequences in which estrangement might have resulted. But it is well, too, that we should remember that, in our international, just as in our municipal relations, arbitration being voluntary on both sides, must always be of the nature of a friendly suit ; and that the first condition of its possibility is that one of the parties at all events shall have previously come to the conclusion that the question in dispute is not worth a war. In this case I suspect that a conclusion had been arrived at by both parties, and hence the success of the arbitration.

“ Those who expect arbitration to become applicable to the graver disputes of nations are probably misled by the frivolous pretexts on which declarations of war are often made at the last—such, for example, as the Emperor not wishing to talk politics when he was drinking his waters, or after he had drunk them. But these are not the causes of war ; deeper causes at least lie behind them, for which deeper remedies than arbitration must be found. We may hope that wars will diminish in frequency by the gradual action of a growing national reason, and the adoption of sounder political principles, national and international, till at last, like duelling in this country, they cease altogether. But if they are to be averted directly, I am convinced that that can be done only by the help of some form of international organization which shall render it possible to bring the armed intervention of neutral nations to bear on them. I fear you will think me a pessimist in this matter. I know that such is the opinion of many of my sanguine friends in Europe, and even of some of my colleagues of the Institute. But I cannot affect a confidence which I do not feel ; and I am wholly unable to discover grounds for expecting results from arbitration in international relations which it does not yield in municipal relations, and this more especially when I reflect how far municipal organization has advanced beyond international organization, and municipal law beyond international law. When I hear of a State of which the citizens have become so reasonable and dispassionate as to abolish compulsory jurisdiction and to trust to voluntary arbitration, I shall then begin to have higher hopes of international reason and moderation, and consequently of International Arbitration. I do not say that an international legislature, an international judicature, and an international executive, after the manner I have elsewhere suggested, are aspirations

capable of realization. Perhaps, as M. Rolin-Jacquemyns* maintains, they are remedies which might prove more dreadful than even the terrible malady they were intended to cure. But I do say that they are the only direct remedies for war, and that, apart from them, we must be contented to teach, to wait, and—to pray. Believe me, etc.,

“ J. LORIMER.”†

The foregoing remarks require no comment further than to express my hearty concurrence with nearly all of them. One point admits of an observation.

As to arbitration between the Northern and Southern States before the breaking out of the civil war in America :—

i.—The Constitution of the United States was framed expressly with a view to avoid and prevent any sort of hostile dispute between the constituent members of the Union. It is beyond the purposes of this pamphlet to enter into an elaborate examination of the functions and powers of the Supreme Court, or the complex, delicate machinery of coördinate Executive, Legislative, and Judicial powers, by which it was thought that all questions, how grave soever, would be peaceably and satisfactorily solved. Without attempting to cite Kent or Story, or other learned jurists, it is quite sufficient, in order to show that it was so understood at the time, to refer to the debates in the Virginian Convention prior to the adoption of the Federal Constitution, and especially to the adverse arguments of George Mason and the replies of Judge Madison.

ii.—An extra-constitutional body of Peace conference was in fact convened in Washington, composed of representatives from the different States. That its efforts proved abortive, and that the constitutional remedies for the alleged wrongs of the South were not resorted to, were simply owing to the

* Editor of *La Revue du Droit International*.

† Professor Lorimer is best known on this side of the Atlantic by his treatise, *The Institutes of Law as determined by the principles of Nature*, Edinburgh, 1872; and his *Constitutionalism of the Future*, and his *Political Progress not necessarily Democratic*, are well worthy the consideration of American publicists.

fact, that from the first it was intended by the leading Southern politicians to disregard them and reject all attempts at settlement. Both kinds of arbitration, that legally organized and prepared in advance, that which was advisory and voluntary, were summarily spurned, and there remained no other tribunal than that of force.

There are also other "signs of the times" which justify the advocates of International Arbitration in entertaining great hope for the future. Railways, ocean steamers, telegraphs, and newspapers have created a solidarity amongst nations, such as has not heretofore existed, too occult as yet for its force to be fully appreciated, but whose influences are visible like the early streaks of the dawn. Evangelical alliances, international meetings for scientific purposes, congresses to consider the treatment of criminals, the international law associations which are soon to assemble in Geneva, and various other societies, testify to the growth of this feeling.* The advanced education of the working classes has provoked and fostered a spirit of inquiry amongst them, and they, too, have their international gatherings, where, amongst other things, they ask why wars in which they are slaughtered by thousands should be wantonly undertaken?† The Congress lately convened at Brussels may be referred to as an evidence that Governments also commence to recognize this tendency towards community amongst nations. It is true that the United States were not represented, that England and France sent delegates fettered by instructions, that Austria sent memoranda from her war department as well as from her foreign office, that other powers maintained a guarded reserve. The conferences of that Congress may prove sterile from many causes, not the least of which is the difficulties inherent in the very nature of the subjects which they propose to regulate by codes. *La Société Française des*

This article was written just before the Congress of the Association for the Reform and Codification of International Law.

† Pourquoi nous égorger? Vaut-il pas mieux d'aimer? Les peuples sont des frères.

amis de la Paix,* protested, with great severity against Articles 3 and 4, as "awakening indignation and horror in the breast of every honest man." The course of the Swiss, Spanish, Dutch, Austrian, Swedish, and Belgian delegates during the debates clearly evinces the doubtful practicability of giving those articles an efficient or satisfactory action, should they be ever accepted. The outcry of the French as to the conduct of the Germans at Weissembourg, at Bazincourt, at Ablis, at Etrépnay and other places, was loud at the time and has never ceased.† The Germans responded by solemn declarations that the so-called victims were individual adventurers, unorganized forces, and in this or in other ways amenable to the utmost rigours of the laws of war. In the matter of requisitions, the German History of the Franco-German War, prepared with the most elaborate care by the Prussian Staff,‡ asserts that all the pains possible were taken to carry out in an orderly manner the proclamation of the King (August 8th), yet such were the obstacles, so serious the embarrassments, so numerous the infractions, that "it required the most energetic intervention of the superior officers to prevent disorder from spreading like a contagion,"—an experience not peculiar to that war, as may be seen from the nature and incidents of some of the claims presented to, and passed upon by the Mixed Commission already referred to as organized under the Treaty of Washington. Much practical good can be scarcely expected therefore from the deliberation of the Congress touching such subjects. It furnishes, nevertheless, an element of hope in that the world has beheld a body of authorized delegates who have discussed in a common tongue some momentous questions, and cited Puffendorf, Vattel, Ortolan, and other authorities in support of their views. But above

* *Courier des Etats-Unis*. Aug. 11, 1874. "Un Congrès des Dissidents."

† The latest French history of the war of 1870-71, by A. Wachtel, Paris, 1874, has at p. 152 a large wood-cut, entitled, "Massacre des blessés dans des fermes converties en Ambulances. Episode de Wissembourg."

‡ "La Guerre Franco-Allemande de 1870-71."—Translation of Major Costa de Serda, Berlin, 1873-4, i. 422, 423.

all, it is a proof that Governments as well as peoples recognize the idea of a common humanity, that this idea exhibits vitality and an aggressive strength, that it exacts respect from the former, and will sooner or later respond to the aspirations and safety of the needs of the latter.

VII.—MUNICIPALITY OF LONDON BILL.

THE Municipal Reform Association has been stirring in the matter of the Local Government of the Metropolis. Several meetings of the Association have been held lately, and extensive means taken to present to the Home Secretary, with great force, a memorial, urging upon the Government the desirability of conferring on a municipal governing body all powers enjoyed by the City of London in connection with the districts comprised in the metropolitan area. The memorial was as follows :

“ That the present government of London is inadequate, and less municipal than the government of the smallest corporate town in the Empire, and far less protective of the interests of the inhabitants in the control and supply of gas, water, and other important matters than the government of Liverpool, Manchester, and the other large corporate towns. That a portion of the metropolis, known as the City, has for centuries enjoyed municipal institutions, to the immense benefit of its citizens ; and your memorialists venture to urge that the most effective municipal government that could be established would be the extension of the powers and duties of the Corporation of the City of London over the metropolitan area. That it was clearly intended in the establishment of the wards without the City, as Farringdon Without and Bishopsgate Without, that such wards should extend over the increasing town area outside. That Parliament has supplied the metropolis only with powers of parochial action, rendering general action on questions affecting the whole metropolis impossible, excepting in matters by special enactment entrusted to the Metropolitan

Board. Your memorialists respectfully represent that it is desirable that all powers enjoyed by the City of London, and by Liverpool, Bradford, Bristol, Hull, and other large towns should be conferred on the metropolis by such changes in its government as will give unity and greater powers and cheaper and better government."

The memorial was signed by a large number of influential persons residing in and near the metropolis, and the deputation itself was numerously attended. Lord Elcho, the President of the Association, introduced the deputation, and in doing so said that what was wanted was an improved government of the metropolis, unity of authority, unity of action, and efficient and economical administration; whereas we have divided authority, leading often to antagonistic and consequently to inefficient administration. His lordship was followed by Mr. Cole, C.B., Rev. R. J. Simpson, of St. Clement's Danes, Major Lyon, and Mr. James Beal, the Secretary of the Association, who quoted the following from a speech of Sir Robert Peel in the debate on the "Corporation Bill" of 1835, that he thought "it much better to place towns under the exclusive control of a corporate authority, invigorated and adapted to their present state of society, than to leave the ancient Corporation precisely where we find it, devolving at the same time all real power, and almost all the functions of administrative authority, upon some new body consolidated on a different and more popular principle. This would be a virtual supercession of the ancient Corporation—a virtual extinction of the power for the exercise of which it was originally intended." Mr. Serjeant Pulling was also present and spoke with the authority of one who had been consulted by the late Sir Benjamin Hall in the preparation of his famous bill dealing with the Government of the metropolis. The learned gentleman said that the task which the Home Secretary had before him was not so much to deal with ancient institutions as to sweep away obstacles created by modern legislation. In the course of a succinct and able historical sketch he showed that, up to the seventeenth

century, the City of London avowedly represented the whole metropolitan area, and that the administration of the corporation would have grown with the growth of the metropolis, but for the forfeiting of the City Charters under Charles II., from which date the system of special legislation had sprung up which had loaded the statute-book with metropolitan Acts of a private nature. The evil was of parliamentary creation, and Parliament must provide the remedy. The Home Secretary, who promised nothing, was glad the deputation had put their views upon the subject into the form of a bill, and was also personally glad to afford them an opportunity to state their views *vivâ voce* to the Minister of the Crown prior to the meeting of the Cabinet. There appears to be little or no chance of the Government taking the matter up, but the Association has gained a great point by drawing the attention of the Government to the measure and thereby obtaining public sympathy and support.

The Association was established some years ago, under the presidency of Lord Ebury, for the purpose of collecting facts and statistics in relation to the Local Government of the Metropolis, and for diffusing the information so collected; and further, to promote the attainment of a Legislative enactment that would secure a more direct and thorough municipal representation of the ratepayers, and a more responsible, efficient, and economical form of Government for the Metropolis. Under its auspices two Bills have been brought into the House of Commons: one by the late Mr. John Stuart Mill, in 1867, and the other by Mr. Charles Buxton, in 1870. This scheme was divided into two parts, to be dealt with in separate measures. By the first bill London would "be formed into one great municipality, with a corporation formed according to the usual model, with councillors selected by all the ratepayers simultaneously with their local authorities, and with aldermen and a lord mayor. That corporation would, in the first place, become invested with all the functions of the present Metropolitan Board of Works, and among the functions of the central government,

thus created, would be the control over the police and over the whole administration of justice ; over all sanitary measures ; over the improvement of streets and public works of all kinds, including sewage, gas, bridges ; over gaols and asylums, and so forth." By the second bill it was proposed to convert the ten existing parliamentary boroughs into municipal boroughs, complete for all purposes of local self-government, each borough to be provided with a mayor, aldermen, and councillors—in short, with a complete machinery for the administration of its separate interests. The essential features of the scheme were "that there should be one Corporation for the whole of London, and that each of the parliamentary boroughs shall have local government for all strictly local purposes. The existing Corporation would then take rank as the first of these federated municipalities, its organization undergoing no change whatever, except that its mayor would have to yield the title of ' Lord Mayor of London ' to the elected chief magistrate of the whole metropolis. The city would continue strictly self-governing in all local matters. The functions it would hand over to the central government are, for the most part, such as it has at present no opportunity of discharging, from the fact of their affecting a larger area than the city authorities can control."

The following is an outline of the present measure :—The preamble to the Bill states that it is expedient that the municipal authority of the City of London be extended throughout the metropolis, and that in and for the metropolis the Corporation do have all powers vested in the Metropolitan Board of Works and in vestries, district boards, or otherwise, under the provisions of the Metropolitan Local Management Act, and be designated the Municipality of London. That municipal wards be created in such parts of the metropolis as are not within the city of London. And that the metropolis be constituted a county of itself, by the name of the county of London, and that provision be made respecting justices of the peace and

county officers and others, and other matters in and connected with the county of London. The Bill then goes on to say that the Act shall take effect on the first of January, 1876. The metropolis shall be a county of itself, by the name of the county of London, and shall be governed by one municipal body. The Lord Mayor, aldermen, and all members of the Municipality be incorporated under the name and title of the Municipality of London. The metropolis be divided into municipal districts to comprise parishes and parts of parishes, to be divided into wards, and the existing Corporations of London and Westminster shall be merged in the municipality of London. The governing body be the Municipal Council of London, consisting of the Lord Mayor, the aldermen, and the municipal councillors. The election of the Lord Mayor to be as heretofore, and to retain such dignity and precedence in all respects. Nine aldermen from among the members of the Municipality of London as representatives of the metropolitan municipal district comprising the city of London. Three aldermen from among the members of the Municipality of London as representatives of each of the other metropolitan municipal districts. The Chairman of the Metropolitan Board of Works be an alderman. The municipal councillors shall be the members of the Metropolitan Board of Works, and the councillors of the metropolitan municipal wards. The Municipal Council shall exercise all functions, rights, powers, authorities, and duties, of the present Corporations, the Metropolitan Board of Works, the Metropolis Management Acts, or any other Act; also the same powers as exercised by the present Corporation shall be transferred to the new. The Lord Mayor's Court to remain as heretofore. The liverymen of the City of London, in their ancient capacity, be deemed a municipal ward. The sheriffs of London, the recorder, the common serjeant, and the chamberlain, and all other officers and servants of the Corporation of the city of London shall become officers and servants respectively of the Municipality of London, and the recorder of London and the common serjeant shall

be appointed by the Municipal Council, and the jurisdiction of the coroner for the county of Middlesex, so far as the same extends to the metropolis, shall cease to exist, and the Municipal Council shall appoint coroners for the county of London. Justices of the peace shall reside within the county of London, or within twenty-five miles of the Guildhall, for such time as he acts as a justice of the peace in and for the county of London. Any alderman shall not be disqualified to act as a justice of the peace by reason only that he has not the qualification by estate required by law in the case of justices of the peace for a county. Justices of the peace for the counties of Middlesex, Surrey, and Kent, (except police magistrates and commissioners of police) shall be transferred to and become exclusively vested in the justices of the peace for the city of London. All prisons situated in the county being under the prison jurisdiction of the county of Middlesex, Surrey or Kent, or of the city of London, shall be transferred to and under the separate prison jurisdiction of the county of London. For the purposes of the Lunatic Asylums Act, 1853, and Acts amending it, the metropolis shall be deemed to be and shall be the county of London. County rates or rates in the nature of county rates may be levied within the whole of the county of London for any purposes for which county rates or rates in the nature of county rates may be levied in any county. The Secretary of State shall direct what property or money vested in the respective clerks of the peace and treasurers of the counties of Middlesex, Surrey and Kent, as such shall be transferred or set apart for the use of the county of London, and shall direct what proportion of any money raised by the Justices of the Peace for these counties respectively on the security of the county rates thereof, remaining owing shall be charged on and paid out of the county rates of London, and shall also specify the mortgages of rates or other securities to be henceforth charged on the last-mentioned county rates. All contracts and agreements made or entered into with or in favour of the justices of

the City of London, or in favour of the respective justices of the counties of Middlesex, Surrey, or Kent, shall remain as valid and effectual, and be proceeded with and enforced. Administrative proceedings may be continued and completed by the justices of the county of London. The Municipal Council may, from time to time, make bye-laws for better carrying into effect the Act, with the advice of the Recorder of London. Nothing in the Act to affect the rights of the Crown, the privileges of the liberty of the Tower of London, or the boundaries of the City of London, or of the counties of Middlesex, Surrey, or Kent, so far as respects the representation of the people in the Commons House of Parliament. Inns of Courts, &c., not to be affected. It shall be lawful for Her Majesty to establish a police court in and for the metropolitan municipal district comprising the City of London, and to appoint three magistrates to the same under the provisions of the Metropolitan Police Acts. All Acts of Parliament in force, shall, so far as the same are consistent with the provisions of this Act, be repealed. The Bill contains saving rights of various kinds.

These are the heads which will form the subject of inquiry in the next session of Parliament, and they are significant of what was foreshadowed by Lord Chancellor Westbury on the 2nd November, 1862, on receiving the Lord Mayor. His Lordship said:—

“That institutions of this great antiquity, which have so upheld their character as to be maintained for so long a period of years, must, undoubtedly, like all human institutions, be subject to become impaired by lapse of time, and to have defects occasioned by that lapse of time; and, on the other hand, it must be subject to wants occasioned by the growing freedom and advancement of mankind. The City over which you are to preside is hemmed in by a vast and increasing population—so vast, indeed, that I believe, it is twentyfold as large as that of the City proper. That very circumstance alone has no doubt placed the matter in one point of view before the whole Corporation of the City of London, upon whom the duty falls—and wisely, no doubt, they will exercise their minds upon the subject—of taking into consideration what may be done to repair the breach which time may have made in their institutions, and, on the other hand, to fit these institutions to the growing wants of the community.”

VIII.—FARWELL ON POWERS.*

THIS treatise is compiled on the plan of Mr. Vaughan Hawkins' work on Wills. The leading propositions are stated in axiomatic form, and detached from the text. This is a very good mode of compiling a law book. Digesting is now the work to which writers must pay special attention. A case can be had for almost every point, if the reports are duly searched for the purpose. Mr. Farwell seems to have shown reasonable diligence in this respect. His work is not, perhaps, as neat in its finish as that of Mr. Hawkins', whom he often cites, but his performance is on the whole creditable, and bears good testimony to his powers of philosophic exposition. Some defects indeed there are in his work, especially as regards precatory powers. Yet the leading points on which we differ from him are rarely connected with any serious blemishes in his text. No one, at all events, will blame him for following the authority of Lord St. Leonards. Where he does throw out an original remark, it is generally sensible and apparently well considered. His exposition, too, runs smoothly, and is free from obscurities, and though we should perhaps prefer a new edition of one of the older works, still there is room for his treatise.

Mr. Farwell, adopting the received classification of powers, divides them into three classes, according as they arise at Common Law, in Equity, or under the Statute of Uses. Following in the wake of preceding writers, however, he incautiously falls into a solecism; for he gives as an example of Common Law powers "a devise by it that his executors do sell his lands." "Powers created by Act of Parliament are also instances," he adds, "of Common Law powers." This opinion greatly extends the theoretical omnipotence of a statute; for down to the present time it has never been alleged, except in treatises on powers, that an Act of Parliament can create Common Law. The phraseology has been used by others as well as Mr. Farwell, and, therefore, it may be readily condoned. In a future edition of his work, however, he may as well remember that the *bonus Homerus* of law, as well as of literature, sometimes takes a brief repose and may fall into inaccuracies of expression. A statute may confer a

* A Concise Treatise on Powers, by George Farwell, B.A., of Lincoln's Inn, Barrister-at-law. London: Stevens and Son.

legal power—a power that will be taken cognizance of by courts of Law as well as of Equity; but it cannot create a Common Law power. *Pari ratione* powers in wills are statutory and not Common Law authorities, for at Common Law no right whatever existed to devise lands. The examples cited, therefore, of Common Law powers are samples of the same class as powers under the Statute of Uses. They all arise under Acts of Parliament.

We regret being thus obliged, *in limine*, to find fault with Mr. Farwell. He adopts, however, only errors common to the most celebrated writers, as well as to himself, who, indeed, also gives very fair promise of authorship. Sinning in such good company he need not take much to heart the undoubted inaccuracies of expression just referred to. But when we come to his second paragraph, we find a more serious cause of quarrel with him. He is here, too, indeed treading in the footsteps of Lord St. Leonard's, yet that he has fallen into error in his second proposition, is as certain though not as patent as that he is incorrect in calling statutory powers by a Common Law name. He alleges, (P. 3) not only as Lord St. Leonard's does, that general powers cannot be reserved in deeds not operating by transmutation of possession, but he goes a step further, and adds "if the deed be not such as to operate by transmutation of possession; that is, if it derive its effect from the Statute of Uses and merely transfer the use, there can be no further valid use than that of the first *cestui qui use*." Now, if Mr. Farwell means that land cannot be settled by deed of bargain and sale upon one for life, remainder to another, it is clear that his opinion is not in harmony with authority. For it appears from 2 Rolls Abridgment, 784, pl. 5, 6; Winch 61, that if a person in consideration of a sum paid by B, bargain and sell land to B for life, remainder to C in fee, these uses will arise to B and C, for though C paid nothing for the land, yet B's payment on his behalf suffices. It is also shown by the same passage in Roll, that if the bargain and sale had been made to B for life, with many remainders over, the consideration may extend to those in remainder. This being so, it is clear that contingent and future uses of every kind may be limited in a deed of bargain and sale, if a consideration passed at the time of the conveyance. If it did, a general power is for the same reason quite valid in such a deed, since appointments are nothing but future uses which, as we have shown by authority, are perfectly valid in deeds of bargain and sale.

Mildmay's case (Rep. 176), which is quoted by Mr. Farwell,

in support of his untenable position, is not really a case in point. The second resolution in that case merely declares that if in a deed operating as a covenant to stand seized, "a proviso is added that the covenantor, for divers good considerations, may make leases for years, &c," such power is void in its creation. Now a covenant to stand seized is one thing and a bargain and sale is another. These classes of assurances resemble each other in not operating by transmutation of possession, but they differ in requiring each, a very different consideration. Any kind of a valuable consideration will support a use in the former class of instruments to future and contingent persons, but the rules respecting a covenant to stand seized are inexorable in requiring the consideration of blood or marriage. The second resolution in *Mildmay's case*, therefore, declares that there can be no departure from such a consideration to "other good considerations." Such considerations are valueless and inoperative in a deed of covenant to stand seized. Accordingly, such assurances are quite obsolete, since there could not have been inserted in them the common limitation to trustees to preserve contingent remainders. For, such trustees, being strangers by blood to the parties, could take no estate whatever under the covenant to stand seized.

But bargains and sales stand on a wholly different footing. It is of the nature of a pecuniary consideration to be unlimited in its operation. It may enure to the benefit of unknown persons, as the authorities already quoted demonstrate. There is consequently no ground for contending that general powers cannot be reserved in such a deed. Of course, no one has doubted that a special power to appoint to relatives may be contained even in a deed of covenant to stand seized. Such instruments and bargains and sales, therefore, have been classed together rather hastily, as regards powers. The reason why general powers cannot be reserved in the former class of deeds does not at all apply to the latter. The fact that both do not operate by transmutation of possession merely affects the question who has the legal estate, and whether the appointment is legal or merely equitable, but by no means defeats the appointment in any case, both at law and in equity. In a review written by us upon *Sugden on Powers*, *supra Law Magazine and Review* (May, 1862, vol. xii., p. 305,) the reader will find this point considered somewhat more at length. It is clear that, before the Statute of Uses, a general power would be good in Equity, if contained in a deed of bargain and sale, or even in a mere contract for value. The statute did not destroy any interest that could have been

previously good as a trust. It is clear, then, from principle as well as authority, that if ever the point comes to be decided by the courts, they will hold that there is no reason whatever why the appointments in question should not be deemed valid.

Treating of powers in gross, our author confounds them in terms with powers appendant. He says of a power of the former class: "It is in gross when the estate so created is beyond and does not affect the estate or interest of such donee, but notwithstanding is annexed in privity to it, and takes effect in the appointee out of an interest vested in the appointor." It does nothing of the sort. He adds, "Thus a power of jointuring given to a tenant for life is in gross." This is correct, but such a power has no effect on the estate of the tenant for life, since the jointure does not take effect until the tenant for life is dead.

The received distinction between powers appendant and powers in gross is that the latter can be extinguished only by express words to that effect, while powers appendant may be destroyed implicit either wholly or in part, as, for instance, by a grant made by the donee of his estate. Mr. Farwell says, "A power may also be released, extinguished, or suspended by implication and without express words, if the intention be clear." He does not cite any case on this point, but there is no ground for doubting the correctness of his opinion, and the authorities cited by him on the general question of the suspension and extinguishment of powers sufficiently bear him out, *Curling v. Shuttleworth*, 6 Bing 131. There is a sort of superstition afloat amongst members of the less learned branch of the profession, that the filing of a Bill of itself, and before decree made, affects the powers and rights of trustees. If it did, it would seriously obstruct their management of the estate. Mr. Farwell adopts Mr. Lewin's view that such powers are affected only after decree made. There is really no ground for supposing the contrary, nor [where no injunction has been prayed for, would, it seem that the institution of the suit has, in the least, affected the rights of trustees dependants. It may "seem more prudent after Bill filed to apply to the court for directions." But, in reality, there is no necessity for such an application, although, no doubt, the maxim, *abundans cautela nemini nocet* is as true in this as in other cases.

^e The case of *Lantsberry v. Collier*, 2 K. and L. 709, 720, following in the wake of *Cole v. Sewell*, 4 Dru. and War. 1, 32, and *Wallis v. Freestone*, 10 Sim. 225, has set at rest the time-honoured contention whether the ordinary powers of sale in

settlements were void, if their execution were not expressly confined within the line of perpetuity. The point may now be deemed as disposed of by authority.

The case of *Lantsberry v Collier* also seems to imply that a power of sale cannot exist in one person, while the fee is in another. But there is no strong ground of principle apart from authority for this assumption. If the tenant in fee is in by the Statute of Uses, why may he not be subject to a shifting clause as in the old limitation to uses to bar dower? As regards the rule of perpetuity, it appears to us that no objection upon that ground is at all applicable to a power of sale. A power of sale tends to bring land into the market. How, then, is it open to the objection that it ties up land for any time, much less for a period beyond the line of perpetuity? That the object of the settlor was that that power should cease when any person under the settlement took a fee in possession is not at all clear as a question of construction. Every one knows, indeed, as a matter of fact, that such is the intention of the parties to the settlement. But the Statute of Frauds requires this, as well as every other intention to settle or dispose of land, to be evidenced in writing. Why then must a presumed intent, not declared in the settlement, be suffered by the court to affect its construction of a written document? If such considerations are to affect the interpretation of assurances, no power or appointment can ever be deemed void for remoteness, for no settlor intends that the powers inserted in the settlement should be illegal. Is the court then, to cut down the excess of a void power in order to give it a partial operation? Had the courts always done this, no one would complain. But from the beginning it was not so; and certainly the Statute of Frauds is in the way of any such liberal construction. Nay, even in the case of a will, intrinsic evidence of the testators circumstances is not admissible to control the construction of an abstract sentence, not affected by any local custom, nor by any ambiguous description of a concrete subject or object.

We refer to the point merely on account of the interest that once attached to it. Mr. Farwell is quite fortified by authority in his statements on the matter. The fact is, that decisions on the rule against perpetuity have been almost from the beginning opposed to principle. Lord St. Leonards, for instance, states, in the first page of his work that questions of perpetuity did not arise at Common Law. They ought not to have so arisen, yet such were mooted in the course of time, and the courts held the objections valid in many cases. Let us

suppose that at the present day, in a Common Law deed, land is limited to A. for life, with a perpetual succession of life estates to his eldest lineal issue; all these remainders would be deemed void, except the estate to the unborn son of A. There are numerous authorities to this effect. Yet, on principle, the objection ought to be untenable; for, as a contingent remainder was in the power of the particular tenant, it could be barred by one who was within the line of perpetuity; the contingent remainder, therefore, was, itself, also within that line. The rule against perpetuities, of course, cannot possibly apply to a vested remainder.

Again, as to powers of sale and exchange, why may not a power be given to A. and his heirs in a deed under the Statute of Uses, although the land is by the same deed limited to B. and his heirs, since a right of way can be given to A. and his heirs over the same land and no objection can be raised to the grant of this easement on the ground of its being a perpetuity? Authority, in short, is the only safe guide at the present day on such points.

Those who are looking for a code not founded on cases ought to consider well what a chaos our legal system would be, if cases were disposed of in this off-hand way. We do not mean to say that a code is not a prime necessity of our time. But it should be, as recommended by us in the *Law Magazine and Review* for last month, a compilation built on cases, which it should consolidate, arrange, and digest, but not abolish.

Mr. Farwell, though generally a careful writer, yet is sometimes less specific than is necessary in his laying down of rules. For instance, one of his propositions is as follows:—"In a gift of real estate, the court may examine whether the circumstances of the testator's property are such as to give effect to the will: in a gift of personality the court cannot go beyond the will."

Dolus versatur in generalibus. The above proposition is too abstract and general to be of any practical use. If Mr. Farwell means that in every gift of realty, the court may look outside the will, in order to aid the construction, he is quite in error. The second branch of his proposition is equally erroneous.

In construing a written document the court must always look outside the instrument, in order to apply it, but not to aid the construction. If the document in its grammatical meaning fits a certain subject, no parol evidence is admissible to prove that the testator meant some other person or thing than those indicated by the grammatical meaning of the terms. But if the document is totally inapplicable to any person or thing known,

or belonging, to the testator or settlor, then *ut res magis valeat* parol evidence can be given to aid the construction. If the court considers that some person or thing is sufficiently, though not accurately, indicated in the document, it will give effect to it accordingly, and this it will do totally irrespectively of the question whether the subject of the gift is realty or personalty. Unless the ambiguity above referred to exists, the court is as limited in its vision in the case of realty as of personalty, and as a matter of fact, ambiguous descriptions of property will be found to occur quite as often as regards specific gifts of personalty, as in respect to devises, all of which are specific. The case of *Jones v. Curry*, 1 Swa. 66, cited by Mr. Farwell, only proves that there are cases of legacies and appointments of personalty that must be determined without admitting extrinsic evidence to aid the construction of the document in question.

The reason of the law is the life of the law. Now, the reason why evidence of the amount of a testator's personal estate, at the time of making his will, though a mere fact unconnected with the question of the testator's intention, is, in general, inadmissible, is because such testimony is irrelevant. For the will, *quoud* the personal estate, has always spoken from the death of the testator, and, consequently, the amount of his personalty at the time of his making the will, although it might bias the judgment, could not, in general, form a just ground of inference as to the meaning of the testator's words. Such evidence, however, may, in certain cases, be material, and then it will be admissible. Mr. Farwell has misconceived the ground of distinction—so far as such really exists—between realty and personalty in respect to this point, see *Bernasconi v. Atkinson*, 10 Hare 345. On the whole, however, he has performed an exceedingly laborious task. The authorities on the subject of powers are in many instances confused, and on this account the method of throwing the leading doctrines into the form of axioms is highly useful both to the practitioner and the student. We have dwelt rather on debatable points in his work rather than on its general merits. It has some misprints and inaccuracies of expression, but, as a rule, both for matter and form, it deserves commendation, and will, doubtless, facilitate a knowledge of the difficult subject of which it treats. It must be interesting to the venerable Lord St. Leonards to trace the progress made in this branch of law since he issued the first edition of his work.

LAW EXAMINATIONS.

The Degree of Bachelor of Law (B.L.).—The following are the regulations made by the University Court of the University of Edinburgh for this new degree. The last six of the following sections are those enacted by the University Court, and recently sanctioned by Her Majesty; but in order to understand these, it is necessary to quote the sections of the ordinance of the Universities Commission of 12th July, 1862, relating to the degree of Bachelor of Laws (LL.B.):—

“ I. No one shall hereafter be admitted as a candidate for the degree of Bachelor of Laws (LL.B.) unless he be a Graduate in Arts of one of the Universities of Scotland, or of England or Ireland, or a Graduate in Arts of a colonial or foreign University, whose degree may, for this purpose, have been specially recognised by the University Court.

“ II. The course of study in Law necessary for the degree of Bachelor of Laws shall extend over three academical years, and shall include attendance on a distinct course in each of the six following departments, viz.:—

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|------------------------------------|---|---|
| 1. Civil Law | } | During courses of not less than eighty lectures each. |
| 2. Law of Scotland | | |
| 3. Conveyancing | } | During courses of not less than forty lectures each. |
| 4. Public Law | | |
| 5. Constitutional Law and History | | |
| 6. Medical Jurisprudence | | |

“ III. No one shall hereafter be admitted to examination as a candidate for the degree of Bachelor of Laws until he has completed the course of study above prescribed; and no one shall be admitted as a candidate in any University unless two at least of the three Academical years of his course of study in Law shall have been in such University.

“ IV. Candidates for the degree of Bachelor of Laws shall be examined, both in writing and *viva voce*, on each of the six departments of Law above specified.

“ V. Each candidate must satisfy the Examiners that he possesses a competent knowledge of Law in each of the said departments; and the Examiners shall further, in judging of the qualifications of candidates, have special regard to their acquirements in the two departments of Public Law and Constitutional Law and history.

“ VI. Except as hereinafter provided with regard to the Uni-

versity of Edinburgh, the Examiners for degrees in Law in each of the said Universities shall be six in number, and there shall always be one Examiner specially qualified for each one of the six departments above specified; and where the Professors of the Faculty of Law in any University do not furnish the requisite number of Examiners duly qualified, the number shall be made up by the appointment of additional Examiners by the University Court; provided always, that no person shall be appointed an additional Examiner in any University, or shall have attained the degree of Bachelor of Laws, in accordance with the provisions of this ordinance.

“IX. Each candidate for the degree of Bachelor of Laws shall pay a fee of five guineas in respect of his examination for the degree.”

“XI. Besides the degrees in Laws above specified, there shall in future be in the University of Edinburgh a second degree in Law granted after examination, namely, the degree of Bachelor of Law (B.L.).

“XII. No one shall be admitted to examination as a candidate for the degree of Bachelor of Law in the University of Edinburgh, unless he be a Graduate in Arts, qualified as prescribed in section 1, or unless he shall have studied in one of the Universities therein mentioned, during at least one academical year, one or more of the subjects included in the course of study in the Faculty of Arts, and shall have passed a satisfactory examination in (1) Latin; (2) Greek, French, or German; and (3) any two of the following subjects, namely, Logic, Moral Philosophy, and Mathematics. The examinations shall be conducted by Examiners in Arts, together with some of the Law Examiners.

“XIII. The course of study in Law necessary for the degree of Bachelor of Law in the University of Edinburgh shall extend over at least two academical years, and shall include attendance on a distinct course, as specified in sec. 2, in each of the first three of the departments therein mentioned, and in any one of the other three departments, and no one shall be admitted to examination as a candidate for the said degree, unless two academical years of his course of study in Law shall have been in the University of Edinburgh.

“XIV. The examination for the said degree of Bachelor of Law in the University of Edinburgh shall be conducted at the same time, and in the same manner, as that for the degree of Bachelor of Laws, and the candidates shall be examined in each

of the departments of Law on which they shall have given attendance, as above required.

"XV. The Examiners for degrees in Law in the University of Edinburgh shall be the Professors in the Faculty of Law, together with two additional Examiners appointed by the University Court from among those who have obtained the degree of Bachelor of Laws, in accordance with the provisions of this ordinance. Each of such additional Examiners shall hold office for the term of three years.

"XVI. The fee to be paid by each candidate for the degree of Bachelor of Law in the University of Edinburgh shall be the same, and the remuneration of the additional Examiners shall be fixed in the same manner, as is provided by secs. 9 and 8 with reference to examinations for the degree of Bachelor of Law."

Similar regulations, but with some variations in detail, have been made by the University Court of the University of Glasgow, and sanctioned by Her Majesty.

OBITUARY.

LORD BENHOLME.—We extract the following from the *Journal of Jurisprudence and Scottish Law Magazine* :—

"Lord Benholme, long and favourably known at the Bar as Hercules Robertson, was born in the year 1795, so that at the time of his death he was verging on his eightieth year. He passed as Advocate in the year 1817, the year after Lord Colonsay was called to the Bar. In 1842 the Conservative Government of that time appointed him Sheriff of Renfrewshire. In 1853 the Liberal Government of that time raised him to the Bench, and on the retirement of Lord Wood, in 1859, he took his place in the Second Division. Twenty-one years of judicial service, fifty-seven years of professional duty, are things which few men can point to at the close of their career. For some years we believe he had been the oldest man who acted as Judge in any Supreme Court in Great Britain."

APPOINTMENTS. "

Mr. Patrick M. Leonard has been appointed to succeed Mr. G. J. Gale as County Court Judge of Hampshire and the Isle of Wight; Mr. Horatio Lloyd to succeed Mr. Vaughan Williams as County Court Judge for North Wales; and Mr. R. A. Fisher, County Court Judge of Bristol, in the place of Mr. E. J. Lloyd, Q.C.

THE LAW MAGAZINE AND REVIEW.

No. XII.—VOL. III.—DECEMBER, 1874.

I.—THE SWISS JURISTENTAG OF 1873.*

By C. H. E. CARMICHAEL, M.A., F.R.S.L.

SINCE this time last year, when I contributed a ~~brief~~ account of the proceedings of the First Italian Juridical Congress,† a meeting of Jurists has been held in a remote corner of Switzerland which ought not, I think, to be passed over without notice.

The old City of Coire, interesting to British travellers from the legends connecting it with King Lucius, duly vouched for by the sign-manual of Garter King of Arms on parchments framed and hung in the Crypt of the Cathedral, contains a population of not more than seven thousand, and lies hid in the heart of the Rhætian Alps. Yet, to quote the words of a very competent French authority, M. Paul Gide,‡ Professor of Law in the faculty of Paris, if we measure the importance of a scientific gathering by the value of its labours, we must accord to the little Congress of Coire, one of the foremost places among the various Juridical Congresses that have lately been held in Europe.

The subject of the Reports and debates at Coire, on the 6th September, 1873, and following days, was one that

* Read at the recent Social Science Congress at Glasgow.

† See *Law Magazine*, Part 11, 1873.

‡ *Revue de Législation Ancienne et Moderne*, No. iii (May and June) 1874.
pp. 451 et seq.

cannot fail to be of interest to the student of comparative Jurisprudence in all countries.

Briefly stated, the question discussed at Coire was, what are the fundamental differences, in the Civil Law, between French and German Legislation, and what is the common ground on which they can meet or be fused? Few subjects could be chosen more full of instruction in the particular branch of the Science of Jurisprudence to which I have adverted, and the political events of 1870-71 lend an additional interest to this attempt at a juridical unification of France and Germany. For Switzerland this question has not simply a theoretical but a directly practical value, and its solution is the more earnestly sought. The difficulties are great, beyond those of any other European country. France, Germany, and Italy, in their respective labours at the unification of their laws have known nothing like the obstacles that stand in the path of the Swiss Jurists. Between French and German Switzerland rises the apparently insurmountable barrier of two entirely different systems of law, as well as of two different languages. Knowing the difficulties of their task the Swiss Jurists set themselves early to work upon it. Ten years have elapsed since a first essay at unification was made in the Canton of Berne, a microcosm of the whole country, half French, half German, and therefore the fittest starting point for such an attempt.

By decree of the Grand Council of Berne, in January, 1864, a Committee was appointed to draw up a United Civil Code (Code Civil Unitaire), for the two parts of the Canton; up to the present time the results produced consist of a general Report,* and the first book of the proposed Code. This rate of progress is not calculated to raise expectations

* Rapport sur les bases d'un Code Civil Unitaire, pour le Canton de Berne, rédigé par M. Leuenberger, Berne, 1869. Projet de Code Civil pour le Canton de Berne. Titre préliminaire, Livre 1er, Des Personnes et de la Famille, Porrentruy, 1871. Reference may also be made to an analysis of the Draft Code, by M. Lyon-Caen, in the "Bulletin de la Société de Législation Comparée," for April, 1873.

of a speedy conclusion of the work which has yet to be taken in hand for the whole of Switzerland, but it would be unreasonable to complain of a slowness due to such exceptional circumstances. In order that each of the conflicting systems might be adequately represented in the discussion at Coire, the Swiss Juristenverein appointed two Reporters, M. Carrard, Professor of Law at the Academy of Lausanne, for French Switzerland, and Herr Hilty, advocate at Coire,* for German Switzerland. These two Reports, which were read before the Congress when it assembled, on the 6th Sept., 1873, under the presidency of M. Planta, and subsequently published by order,† may be fairly taken as the expression of juridical public opinion in Switzerland on the subject of unification.

The Reporters both begin with a general outline of Swiss Legislation, no easy task, when it is borne in mind that twenty-six Law systems prevail in the twenty-two cantons and portions of cantons, several of which are divided between different juridical administrations. Of these twenty-six bodies of Jurisprudence, fourteen only are codified, namely, Geneva (Code Napoléon), Berne-Jura (Code Napoléon), Vaud (1819, completed 1853), Berne, ancient canton (1824—30), Lucerne (1832, completed 1861 and 1865), Freiburg (1834—49), Ticino (1838, revised 1873), Solothurn (1842—48), Zurich, (1844—46), Aargau (1847—58), Neuchâtel (1854—55), Valais (1855), Grisons (1862), Schaffhausen (1864—65). It thus appears that the seven French cantons all enjoy a codified system, and, therefore, that out of the fourteen Codes existing in Switzerland, the French, or "Code Napoléon," element, occupies half the field. There are commencements of codification, which would belong, however, to the Teutonic element, in Zug, Thurgau, Glarus,

* Now Professor at the University of Berne.

† Originally in vol. ix. of the "*Zeitschrift des Bern: Juristenvereins*," and afterwards separately, (the former in French, the latter in German) under the title, "*Die Haupt differentzen der Französisch-und Deutsch-Schweizerischen Civilgesetzgebung*. Berne, 1873.

and Lower Unterwalden. In considering the juridical aspect of the various Cantons it is necessary to note carefully their sub-divisions, which tend greatly to perplex the question. Thus, among the French cantons, Geneva Town, and the Bernese-Jura are under the Code Napoléon, only modified slightly in certain details; the canton of Neuchâtel, though never under the Code Napoléon, has yet followed it very closely; the cantons of Valais and Ticino are noticeable as combining with the Code Napoléon, the old Codes of the Kingdom of Sardinia and Duchy of Parma; Canton Vaud has a Civil Code which presents a curious mixture of French law, and old local statute law; lastly, there is the Canton of Fribourg, which may be considered the point of junction between the "Pays de Droit Français and Pays de Droit Germanique."

In the German cantons, nineteen systems of law prevail, of which six only are codified, the rest forming, as Mr. Gide says, "a veritable legislative mosaic." Through this labyrinth, however, the reporters have skilfully threaded their way, and we are thus enabled to touch very briefly on the salient points noted by them. The first charge which the German Reporter, Herr Hilty,* brings against the French Civil Code and the Swiss systems which have imitated it, is the absence of moral "personæ." They had but a very scanty recognition, M. Gide points out, in the Roman Law. German Codes, on the other hand, generally begin by dividing persons into physical and juridical, and take special pains in regulating the rights of the latter class. As against this may be set what M. Gide calls a grave lacuna in the German Codes, namely, the absence of a title on registration ("Actes de l'état Civil") such as finds place both in the French Code and the Codes of French Switzerland. In most of the German cantons, and even in the French canton of Vaud, the registers are kept by the clergy, without the guarantees afforded by the French law. This state of

* P. 78 of his Report. Cf. Carrard's Report, pp. 32-33. Carrard and Hilty are quite one on this point.

things, however, is hardly likely to be allowed to continue, under existing politico-religious circumstances, and in fact it is noted by M. Gide that article 53 of the new Federal Constitution of 1874 provides that "registration and the custody of registers shall belong to the State." Up to this point we have been on comparatively easy ground, where the one system of legislation may be made to supplement the other. But with the Marriage Law of Switzerland serious differences commence. In the German cantons, whether Roman Catholic or Protestant, marriage is considered, if not as a Sacrament, at least as a religious act. Not only does the priest or pastor celebrate the rite, and exact communion-tickets from the couple, but the marriage is itself regulated in accordance with Ecclesiastical Law. Hence in the mixed cantons persons belonging to different confessions are under different Legislations, and sometimes are forbidden to inter-marry. The French cantons, with the exception of the two Catholic cantons of Fribourg and Valais, have followed the example of France, and secularised the marriage ceremony. To this rule there is an apparent exception also in Canton Vaud, but M. Carrard contends* that it is only apparent, for in that canton "the pastor acts simply as a State functionary, whose duty it is to put into execution the Laws of the State and not of his Church." Whether the pastor can or does always so entirely divest himself of his clerical character may be doubted. The French cantons have not only substituted civil for religious marriage, but have also freed marriage from many of the restrictions and impediments under which it laboured before the French Revolution.

In the German cantons an entirely opposite mode of treatment prevails, of which M. Carrard gives some curious particulars. The list of canonical impediments upheld by the Roman Curia is itself sufficiently large, but the German cantons add communal impediments which must sometimes

* Report, pp. 21-5.

be severe enough in their application to shake the patriotism of persons desirous of marrying. In these fatherly cantons the commune is regarded as an extension of the family, and the State only gives its daughters in marriage to those thrifty men who can provide for their possible children, and whose bachelor conduct was in keeping with the sanctity of matrimony. In these cantons, moreover, the support of needy citizens is a debt upon the commune; hence the commune is opposed to marriages which would increase its expenses, and only permits them to persons of substance.

As regards the dissolution of the marriage-tie the differences between Cantonal Legislations are not so great. All the Protestant Cantons, both German and French, recognise divorce; all the Roman Catholic Cantons, both French and German, refuse to admit it. The only difference is that in the French Protestant Cantons, the divorce is pronounced by the civil, in the German Cantons by the religious, authorities. So indispensable is the intervention of the clergy deemed in this matter in the cantons where it is required, that in Canton Zurich a Roman Catholic couple, if unable to have their divorce pronounced by their curé, must get it pronounced by the Protestant pastor.* Thus far, in the eyes of the German Reporter, French Law deserves the preference. On all points connected with marriage and divorce, Herr Hilty says he does not hesitate to declare that the French principles ought to be adopted by German Switzerland. And the New Constitution of the present year (1874) takes practically the same view, for by article 54, "no impediment to marriage can be based upon confessional considerations† (i.e., the Laws Ecclesiastical of any Religious Community), upon the poverty of either party, upon their conduct, or any other police reason whatever." The

* Carrard, pp. 25-6; Hilty, pp. 82-8.

† Hence the marriage of ecclesiastics who have received major orders in the Roman Communion is legal in Switzerland. "Plus conséquents qu'on ne l'est en France," says Prof. Rivier, in the "*Revue de Droit International*," "aucun obstacle ne sera mis au mariage des prêtres."

grammatical and literal interpretation of this article of the New Swiss Constitution would probably enable a man to marry his grandmother; whether it will have the effect of producing such a complication time has yet to shew. The power of the father is even slighter under the Codes of German-Switzerland than under the French Code. The father is obliged to provide for ("doter") each of his children in proportion to his means; neither their emancipation nor their marriage is dependent on his consent, and even in the case of a minor he cannot refuse his consent without shewing satisfactory grounds for the refusal. In fact it may be said that in German Switzerland "*Patria Potestas*" is reduced to "*Tutela*," of which indeed it bears the name, "*Vorumundschaft*," and this "*Tutela*" even is only exercised under the control, or "*Ober Vormundschaft*" * of the municipality, one of the most characteristic Institutions of German Switzerland. The French Cantons, following the Code Napoléon, have generally made "*Tutela*" an almost exclusively family arrangement. But in the German Cantons, where the commune is, as Mr. Gide observes, a species of "*Gens*," all persons requiring guardians are placed under the protection of the Municipality, and the list includes not only minors, lunatics, and prodigals, but also, in some Cantons, paupers and women. The guardianship of women is to be found even in some Cantons of French Switzerland, namely, Vaud and Valais. In the Canton of Berne a law of 29th May, 1847, places the widow under the guardianship of her children, and makes her dependent upon them. "All these rules," says Mr. Carrard, "are condemned to an early extinction; the Civil Law must, as far as possible, admit the equality of the sexes. This principle can only be departed from when it is necessary for the exceptional protection of women." On this point the conclusions of the German Reporter, Herr Hilty, are identical with those of his French colleague. It may be noted that since 1870 the

* Carrard, p. 27, Hilty, p. 88.

"Tutela" of women has been abolished in Canton Lucerne, and, in principle at least, (so says M. Gide, *op. cit.* p. 359) in Canton Vaud, it has disappeared from the Draft Code of Berne (1871).^{*} According to the new Judicial Constitution of the current year, (art. 61), "Legislation on Civil Capacity belongs to the Confederation."

Passing from the law of persons to the law of things, we note the same divergences as under the former head. As it has been observed that moral persons, *i.e.*, Associations and Corporations, are more favourably regarded by German than French Law, so we find that collective and undivided property is more frequently to be met with in the German than in the French Cantons. These last have remained faithful to the Roman tradition, considering property as an individual, absolute, exclusive right, and every restriction on this right as a servitude. Several of the Cantons of French Switzerland indeed, namely, Vaud, Neuchâtel, and Fribourg, go even further than France itself. "Their system," says M. Carrard, "deserves to be known, it has given rise to no complaints, and presents many advantages. Every sale of immoveables must bear receipt for the fully paid price, and no sale can be effected under conditions of delaying part of the payment, or of annulling the sale, or of re-acquisition (*ni sous condition suspensive ou résolutoire, ni sous clause de réméré.*)"

In German Switzerland much of the soil has remained undivided. Some Codes even decide that in the partition of immoveables the parts cannot fall below a certain minimum; once reduced to this the parcel becomes incapable of further partition, or at least can only be sub-divided with the unanimous consent of the co-proprietors. In these cantons, moreover, property is taxed with real rights of many different kinds, property taxes, tithes, &c. It is also subject to numerous rights of vicinage unknown to the Roman Law, and the laws which descend from it. "German Law," says

^{*} This is as much as to say, observes M. Rivier, that this ancient Institution will not pass into the new Code.

M. Carrard,* "raises to the height of a juridical principle the moral obligation of neighbouring landowners to help, each other, and to live in harmony. In canton Grisons the Good Samaritan would have had little merit in giving water from his well to a neighbour, since that neighbour would have had the right to come and take it, if needed for himself or his cattle." We may perhaps be tempted to ask whether the German Swiss love their neighbours.

Under the head of Wills and Successions, the differences between the two great law-Systems in Switzerland are even more marked.† In the French cantons, the principle of Roman Law, which gives the "paterfamilias" the right to dispose of his patrimony, seems still to prevail. Reservation of an estate for heirs (*Réserve Héréditaire*‡) is in those cantons generally more restricted than in France. In Vaud, Neuchâtel, Berne, and Fribourg, there is no reservation for ascendants. In Vaud, Neuchâtel, and Ticino, the father can dispose of half his property, whatever be the number of his children. In German-Switzerland a different rule prevails, except in Canton Zug, where the child still has a right only to a fixed legitim (*légitime*) of 10 francs, old currency. "With this exception we may say," M. Carrard remarks, "that the notion of *family joint ownership* prevails in German Switzerland. The will is almost as unknown there now as in the time of Tacitus." It was only in 1865 that a law of Canton Appenzell (Inner Rhodes) declared that the free citizen, who makes his own laws, ought not any longer to be limited, as heretofore, in his freedom of testation; by a great innovation the same law decreed that the citizen who has children may dispose of

* Pp. 35-40.

† The male line is preferred in Zurich, Berne, Soleure, Lucerne, Lower Unterwalden; rights of seniority exist at Soleure and St. Gall, of juniority at Soleure and Berne, and probably also elsewhere, according to M. Rivier ("Revue de Droit International," 1874, No. II).

‡ An article by M. G. Boissonade on a little studied branch of this subject, "*La Réserve Héréditaire dans l'Inde Ancienne et Moderne*," is to be found in Vol. I. of the "*Revue de Législation*," for 1870-71.

the fiftieth part of his fortune, and the childless citizen of the twentieth. This slowness to admit testamentary power is found even in cantons whose capitals are university towns. In Zurich, before the Code of 1854, the father was obliged to leave all his property to his children, and the relations to the remotest degree had the right to a "légitime." Now the father can only leave the fifth part to his children, and the tenth to strangers; a right to half the succession is still secured to cousins-german.* In Basle the citizen who has either ascendants or descendants living cannot execute a will. In some Cantons (*e.g.* Glarus) the consent of the heirs must be obtained in order to make the smallest bequest. In Nidwalden (Lower Unterwalden), by a law of 1859, a jury can annul, either in the life time or after the death of the testator, legacies which do not appear equitable, and in conformity with the position either of the deceased, or of the heirs, or of the legatees; a somewhat sweeping list of exceptions. It is not expected by either Reporter that these usages, and other similar ones, will survive the new legislation. The Code of the future will, it is anticipated, give its preference to the German Law on Obligations and Hypothec. By art. 64 of the new Constitution, Legislation on subjects connected with the Law of Obligations, including Commercial Law, the Law of Exchange, and of Bankruptcy, is to belong to the Confederation. In the case of Hypothec the principle of publicity is rigorously insisted upon by the German Law, and M. Carrard considers that this system is so favourable to the rapidity and security of transactions, and therefore to the security of credit, that it clearly ought to prevail.

Whatever the Codified Swiss Law may prove in years to come, the glance here given at the diversities of systems now in operation on the soil of the "Playground of Europe" will not, I hope, be devoid of interest at the present time.

* M. Rivier considers that there should be reservation for ascendants, perhaps also for brothers and sisters, but not for other collaterals.

II.—THE PROGRESS OF PEACE PRINCIPLES.

By EDWARD A. LAWRENCE, D.D.

THE principles which form the basis of this association and the mode of its union make the foundation of government and of all equitable rule among men. Summarily, they are Truth, Justice, and Humanity, or Fraternity. All good government rests on these, and all harmonious intercourse among men and nations flows out from them. Take these away, and the heavens fall—the heavens of unity and peace

These simple principles are always at one with each other and with everything else that is true and good, and this makes them strong; and they bring into concord all the peoples and nations who are ruled by them.

They are universally applicable, but have not yet, after so many generations, come to even a general application.

The peace which these principles secure was man's primal condition; they are every man's birth-right—be he savage or civilized, subject or sovereign. Count Portalis, in words richer than gold, calls peace "more than a right—the safeguard of all other rights." War, in its simplest elements, and in all its forms, is a violence and a disorder on one side or both, and is built on falsehood and wrong.

And yet this war-state, ever since the slaughter of the second-born by the first, has been well-nigh the universal condition of society. War, always war—everywhere war! Must it be war for ever? Is there no peace?

There are two methods of treating these questions—history and prophecy. And the former gives the clue to the latter—what has been, to what will be.

In glancing at the progress of these principles, note—

First, what has taken place in regard to the implements of war. If modern science has invented some that are more devastating, it has, nevertheless, excluded others more bar-

barous and cruel, and, by making wars more expensive and decisive, has rendered them less frequent and briefer. Poisoned missiles, poisoning food and fountains of water, implements of torture, false signals, and perfidies, once common, are nearly banished from civilized warfare. The tomahawk, the scalping knife, and the bounty money offered by Christian nations to savage warriors for the scalps of Christian men, not one hundred years ago, were regarded as perfectly honourable, and as implements which providence and nature had put into their hands. What nation now evokes or tolerates any of these ?

Secondly. The present methods and usages of war indicate further the advance that has been made.

In that savagery that makes war a chief vocation, there was no law except the will and passion of the strongest. Force settled all disputes :

“ Our strong arms be our conscience, and swords our law.”

Slaughter, indiscriminate, without truce or quarter, of the non-combating men, women, and children, was the rule, and anything equitable or humane the exception.

It was a first step of progress in this direction when captives were neither destroyed nor tortured, but sold into slavery. During the wars of the English Commonwealth Scotch Covenanters were transported by Parliament to the infant colonies in New England, and sold into bondage, though I have never found that any of the Pilgrims were among the purchasers. In the war of these colonists, however, with King Philip, the powerful leader of savage tribes combined for their extermination, the Providence plantation ordered some of the captives to be sold ; and Roger Williams, the apostle of freedom, and man of peace, received a few shares as a sort of bank-stock or government bonds.

It was a second mitigating movement when captives, instead of being enslaved, came to be held as prisoners, humanely cared for, and ransomed or exchanged at the close of the war, if not released on parole before. This marks a great advance on the indiscriminate slaughter-policy.

Once, and not very long since, all who belonged to nations that were at war were counted foes. Indeed, *hostis* was the term for all foreigners. There were no non-combatants or neutrals on either side, and every means and measure of injury were deemed legitimate that were effectual. Now a new science has arisen—the science of neutrals in war; and out of the science has grown a statute of limitation. The province of war is greatly restricted, and its woes alleviated, by the dominating idea that only those are hostile who are organized in armies; and that as little harm as possible is to be done to all others. Parties of belligerent nations, formerly seized as prisoners on the outbreak of war, and transported as dangerous, their business broken up and their property destroyed or confiscated, may now as friends dwell together on either side in peaceful occupations and homes.

It was a principle almost universal that war should meet its own costs. It prevailed in the Thirty Years' War with all the Catholic leaders, except Gustavus Adolphus. And it was Napoleon Bonaparte's first financial maxim that war must pay, and *as it goes along*. This meant forced contributions, licensed spoliations, which made soldiers ruthless ravagers and robbers. Nearly all civilized nations now agree in reprobating such a barbarism. And if the vanquished must bear the expenses of the war, on both sides, as some think they ought, especially if they are the aggressors, it is imposed courteously, and by diplomatic arrangement, and may come by cession of territory, or in stipulated instalments, or in both. War is, naturally, remorseless as to the rights of property. Zenophon laid down the law to his straggling army: "Whatever belongs to the conquered, becomes the property of the victors." This is the old outrage that "might makes right." Equity is nothing. Humanity is nothing. Religion is nothing. Force is everything, "*La force prime le droit*." Brigandage and piracy were equitable whenever they were successful, and had to be treated with by the weaker party as honorable competitors for their share of the public good.

This abominable doctrine now lingers, thank heaven, only in the outskirts of a civilization that is fast shaking it off altogether. Brigandage and piracy, by the more advanced nations, are made capital crimes. And privateering, which Dr. Franklin, a hundred years ago, called "a relic of barbarism," and which he so earnestly sought to check by the treaty-making power,—a kind of piracy let loose on the peaceful commerce of the non-combatants,—has been since legitimatized by belligerents, and sometimes winked at by neutral powers. All this, I trust, these humanising principles have cast into irrecoverable disgrace. "Privateering," declare the Seven Powers at the Peace of Paris, in 1856, "is, and remains, abolished." And, further, not only neutral ships are safe on the high sea, which is the home of all, but hostile property, if not contraband, is safe in them, under the generally accepted doctrine that "free ships make free goods."

For many generations, it was neither discreditable nor uncommon for neutral nations to hire out their citizens as soldiers to their belligerent neighbours; sometimes to one side, sometimes to the other, sometimes to both; dealing out death to each other, not for right, nor the false glare of glory, but for the *pay*. The English subsidized the Hessians for this purpose in the war of the American Revolution. Switzerland, having fewer wars than some other nations, has traded largely in this way with her French and Italian neighbours. Do the cantons now send out their brave sons to fields of carnage, and have them brought back dead, or gashed, or maimed for money? Has this sturdy republic now such "an itching palm?" And why not? From the force of these humanising principles, which, in the form of neutral rights and regulations, have not only cut off such a mercenary traffic in human life, but made recruiting among neutrals for war purposes a grave offence against international comity and law,—an offence for which, in 1850, a British minister was summarily dismissed and dishonoured by the American Government at Washington.

Third. A glance at the occasions of war discloses the equitable and humane tendencies of the age, which are the product of these principles.

From time immemorial, the greed of empire, of treasures, and of captives for the slave-market, has been held as a perfectly lawful and honorable *casus belli*. Many of the most devastating and cruel feuds, ancient and modern, have had just this and no other reason. The slave-trade, born and bred of war, was long sustained by Christian nations under the hallucination of benevolence towards the poor captives, and was prosecuted with apostolic zeal as a source of national prosperity. These baubles of benevolence and of wealth have both been exploded. The slave-trade is piracy in almost all Christian countries, and in some of them the trader is liable to be hung. The slave markets are closed or closing all over the world. And last, but not least, the slave pen and auction-block no longer stand side by side with the altar of liberty in the capital of the great American republic, as for almost a hundred years, crying shame on its Declaration of Independence, shame on its Constitution, shame on its ideas of the inalienable rights of man,—while holding so many in abjectest bondage.

Next to this greed, *lex talionis* has engendered war-struggles innumerable and almost interminable, from the single combat and provincial wars to the tramp and rush of imperial armies. The siege of Troy, one of the world's great and useless conflicts which Homer has made immortal—just how much is fact and how much poetry we cannot certainly know—was more a resentment of violated hospitality than for the recovery of a debauched woman. And because old Priam and noble Hector espoused the wrongs of the women violator, pleading,—

“The blame is with the immortal gods who have sent
These pestilent Greeks against us,”

Troy was blotted out.

The last war of the United States with England was a retaliation for the imprisonment of a few American seamen,

more by mistake than intention; and for the "Orders in Council" that laid an embargo on American commerce with France. It was pre-eminently a vain and foolish strife, in which both sides were immense losers. And when it had gone on three years, and neither party was able to tell what they were fighting about, they came to the sage conclusion that there was no reason for fighting any longer. Such a war between England and America can never occur again. Both nations have more light now, and more love of justice and of peace; and they are more one by the cement of religion and language and a community of interests that will not let them break into war.

Perhaps the recent Franco-Prussian war illustrates the *lex talionis* as perfectly as any of the late national struggles. The pretext was offended honour in the person of a not over-wise representative, and a little trouble about Spain; and the only salve for the wound was blood. Old grudges, revived, on the part of the assailants, made them, perhaps, more adventurous and sanguine than was wise. Possibly it was old humiliations on the part of the defendants that, when they became victors, measured out retribution after the manner of the peasant whom a traveller found bruising with his boot-heel the head of a snake. "Why do you mangle the poor creature so?" said the traveller; "it was dead long ago." "I know that," replied the peasant, "but I want to make him *sensible* of it."

Who can tell but these terrible resentments that come on the vanquished when they provoke war, will make men less ready to play at such a hazardous and cruel game? Who can fail to see that educated *mind*-power is far better than mere vassal-force, even for fighting, when it must fight? Yet who will say revenge, which, by all Christian and benignant standards, is a vice and sin in private persons, becomes a right and an element of virtue and honour in a ruler or a nation? Is there one code for morals to citizens and another for soldiers?

Wars for mere national aggrandizement—for *glory*, have

become less frequent as the people, who are more and more seen to constitute the State, become, through the sense of truth and right, more intelligent and moral. They learn that the real glory of a nation does not come from battle fields, but from the arts and industries of peace. They see, by these divine lights, that the glitter and pomp of martial strife, of military funerals, and monuments and feast days, are only the gilded fictions of false greatness, tinselry on the ghastliness of a national charnel-house. "There is nothing truly great and glorious," said Seneca, that old-fashioned moralist, "but what is *virtuous*." The glory of war!—what is it? Is it physical strength—mere prowess? The lion and tiger have more of this than the more stalwart fighter. Is it leading ravaging armies into an enemy's country, filling it with wailing widows and orphans? The greater, then, the destruction of men's lives, the greater the genius and the greater the glory of the general. Is it the lust of empire and of power, to which eight millions of noble Romans fell victims in the western conquests of Cæsar, and four millions of the French people, with their allies, were sacrificed through the world striding ambition of the first Napoleon? Oh, if this, which it so appals one to speak of, is glory, what is cruelty, what is shame? And yet how full of it has the world been!

In less than eight hundred years England has been engaged in twenty-four wars with France, one of her nearest neighbours, which occupied two hundred and sixty-six years—one third part of the whole time. Will she have as many in the eight hundred to come? She has had twelve with Scotland. England and Scotland are as *one* now, by a sense of truth and justice and a wise self-interest, as to have done with bloody strifes. Only one hundred years of peace for England during the last eight centuries preceding the present!—*seven-eighths* in which the gates of Jannet stood wide open, and *one* only in which they were closed. In the last fifty years three-fourths have been marked by peace and but one-fourth marked by war. A smaller gain for

harmony during this period marks the history of some other nations.

The great conflict of our times is coming to be moral rather than military—about these very principles which are the educators and best defenders of the nations. It is a war of ideas carried on by investigations and by conferences and conventions, discussions leading to political and moral renovations and emancipations. It is a struggle, sometimes of the peoples with their rulers against arbitrary power, and sometimes of the State with the Church—a Church that claims to be *supreme*, and in its Head *infallible*. Happily, this last is now a bloodless struggle, the conflict of religious toleration and of constitutional government with paper anathemas and despotic rule. Happily, the Church is no longer a war power. It has no standing armies, nor the means of raising them, and no *need* of any. This diminishes greatly the occasions of war, and puts out of the conflict a power that has been immensely belligerent and troublesome. “If any one,” declares the celebrated syllabus, “says that the Roman pontiff ought to reconcile himself with progress, liberalism, and civilisation, as lately introduced, let him be anathema.” “*Non possumus, non possumus!*” Happily, too, we have passed the period of great religious wars. Islamism, if not in its conception a war power, became so soon after its birth—at its baptism. From the eighth to the fifteenth century the prophet of the sword blighted with blood some of the fairest portions of Christian Europe and Asia. He has come to a chronic weakness, and has fallen into the hands of the Christian doctors, who are humanely engaged in restoring his political constitution, and, if possible, preserving his civil existence. The three great branches of the Church—the Greek, the Romish, and the Protestant—have either no disposition to fight, except with weapons drawn from their own divine armory, or they have no power to wield any other. More than ever are the intelligent adherents to these churches nearing each other, on the ground of their fundamental agreements, letting their

minor differences fall into the background. More than ever are they thus conciliating the nations by the great unifying power of their doctrines and a divinely pacific spirit.

Fourth. In nothing, perhaps, is the advance of these principles more evident than in the rise of a system of international law, crowned with the idea of arbitration as the substitute for war.

In the earlier antiquity there were no laws, or next to none, regulating the intercourse of nations, except those extemporised by force for the occasion. Justice and truth had very little to do in such matters, and kindness and love nothing. Gain or passion or power ruled everywhere, and right, in war, was nothing and nowhere. The world was massed together by despots in vast empires that crushed out, by the tramp of war, almost every good thing; or it was split up into lawless tribes and petty rival sovereignties, that were engaged in devouring each other, from ambition or revenge. During the Anglo-Saxon period there were seven of these little kingdoms in England, and fifteen in what is now Great Britain. In the feudal times the homes of the barons were strong castles, and their serfs standing armies ever ready for war. Cities were walled for the safety of the citizens, and all outside were enemies or robbers. How different the tendencies of our modern society! The tribes are drawing into principalities and States; the principalities and States are growing into nations, and the nations are interlinking closer with each other by emigration and immigration, by loans, joint corporations, and capital, by commerce and science, by literature, religion, and the common humanity.

This intercourse of the nations has generated laws, and usages with the force of law. These were few at first and flexible, but being rooted mainly in equity they tended to harmonisation and humanity. "Three centuries of civilization," wrote Talleyrand to Bonaparte, "have given to Europe a law of nations, for which, according to an illustrious writer, human nature cannot be sufficiently thankful. This law is

founded on the principle that nations ought to do to one another in peace the most good, and in war the least possible evil."

As the nations have advanced in general intelligence, and gained clearer ideas of justice, and as they have been brought into more constant communication by the art of printing, by steam power, and telegraphy, new unities have been effected, and more full and more clearly defined laws of intercourse demanded. These have come slowly but steadily, as they were called for by the immense interests, material and social, which it was found were reciprocal and mutual, until reciprocity has come to be held almost as an international law, from its lucrative equity. The need of interpostal regulations was felt, and they have come. A general coin, with a metallic basis and unity in denominations, would facilitate cosmopolitan travel and trade, and banish the confusion that one feels from diverse coins, even in a journey from Geneva to Berlin.

It is being felt that international copyright is a matter of equity to authors, and that the piracy of publishers, instead of providing a cheap literature, is, by discouraging authorship, a damage to all literature and learning. Unity of weights and measures had become almost indispensable in this growing fraternization of the nations; and France, by a wonderful achievement in science, produced the metric system, which, despite obstacles that seemed to wise men insurmountable, has gained acceptance among most of the civilized nations, and is fast becoming universal.

These new unifiers, which show Gutenberg and Watt, and Fulton and Morse, and other such discoverers, to have been eminent among peace-makers, make necessary open the way to still other unifying links and laws. They have furnished materials for the one great need of the nations—an international code. Of such a code our honoured president and coadjutor in the cause, Mr. D. Dudley Field, has made an elaborate and auspicious beginning. Such a code is demanded as a financial, social,

and moral necessity, by the same law that requires a municipal or national code. The time has come in the progress of things when the civilized nations need to be organized for the administration of international justice, as really as do the states or cantons of a republic, the provinces of an empire, or the citizens of a kingdom. For the basis of such an organism there can be found nothing strong and sure but these immutable principles of morality which demand equity and concord equally in the intercourse of nations and of individuals, and which are as able to make upright nations as honest men. And any essential infraction of them is as unwise in policy as perverse in morals. For although these international laws may have commenced mainly as expedients of self-interest, it was found that compacts and policies formed in essential antagonism to them could not long stand. Of this the Holy Alliance in 1815 was an impressive illustration. It did not understand the age it tried to live in and control. This explains the gradually improved quality of international law, and its growth into a system of general equity and fraternity. The nations cannot long agree on anything essentially inhuman or immoral. Great wrongs, in the light of our times, are more and more seen to be inexpedient as well as wrong. There are great blunders which every decade makes more ignominious. Such are the lessons of experience, the judgment of history, which is the unmistakable voice of a supreme power. "The surest principle of power a nation can possess," said a premier of England, nearly a hundred years ago, "is strict attention to the principles of justice. If we have been deficient in justice towards other States, we have been deficient in wisdom."

But the organization of the nations for the administration of justice and of peace would be incomplete without a tribunal of justice. Laws, a code of international law, point to a supreme court of the nations; the legislative to the judicial. They demand the reference of difficult cases to impartial judges, agreed on by the commonwealth of nations,

or by the parties immediately concerned. This is the completing idea, reached by a law of progress as real in the moral world as that of growth from sunlight in the vegetable. The nations have gone too far in this direction not to go farther. There is logically no moral, or political, or scientific stopping-place short of this goal. And the welcome which this crowning idea is receiving shows how profound is the conviction that the nations must have less war and more peace; that reason, and not the sword, must be the arbiter. The more advanced peoples have been preparing for it by the reactionary horrors of war, and the injury that the whole family of nations suffers from its occurrence between any of the members; by the blessings of a more prolonged peace which some are beginning to enjoy; by the increasing sway of justice, and a common sentiment of humanity that is gaining ground among the intelligent middle-class, and forming a public conscience. The best public sentiment of Christendom hails it. The soundest thinkers, publicists, jurists, statesmen, philanthropists, and moralists are taking counsel together in leagues and assemblies, national and international, civil and diplomatic, concerning it. And these thinkers are the leaders, and in the end the real rulers of the nations.

This arbitration for the family of nations is an ultimate provision in Government for their largest unity and greatest prosperity, a prosperity that can come only with peace. It is practicable as well as reasonable; something in view of which we can say to the disbelievers and doubters, "Our object is not an abstraction or fancy. The thing can be done, for it has been." Two of the foremost commercial nations on the earth, with fighting men enough on both sides, and many who want to fight, and with tangles that some thought could not be unravelled, but must be cut, have clearly demonstrated its entire feasibility.

Henry IV. of France, in the early part of the seventeenth century, proposed a confederacy of the European nations for purposes of peace. But the world was not ready for it, and

it failed. The Treaty of Paris in 1856 is said by a distinguished French statesman, Drouyn de Lhuys, to have consecrated the principle of arbitration. That is a good word, *consecrated*, to express what was done in that memorable assembly by some of the choicest minds of Europe. But they did more than consecrate it. They commended its adoption by the nations not represented there. Mr. Gladstone declared this proposal to submit international differences to arbitration to be a great triumph and a powerful engine in behalf of civilization and humanity. Lord Clarendon calls arbitration, in comparison with the old war method, "a happy innovation." And although five of the seven contracting powers have since been engaged in war, and some more than once, and although Count Bismarck asserted in 1864 that "questions of right can be settled only by the bayonet in European quarrels," yet the influence of that protocol has been most auspicious. It will ever after make war more difficult, and the way to peace more plain and easy. Who expected it would put a sudden stop to the wastes and wickedness of wars, which, like some other chronic evils, can cease entirely only in the passing away of the generation that has endured them? Who does not know that the bayonet settles who is the stronger rather than what is right, and that war is generally an engine for enforcing foregone conclusions, whether right or wrong?

But in the face of the great German diplomatist's assertion, the Geneva award declares that questions of right in European and American quarrels can be settled without the bayonet, and vastly better than with it. Here in this beautiful Geneva, at the foot of this peaceful lake, without the discharge of a musket, three men, with their pens and paper and a few figures, decided the most perplexing questions between two great nations; and more than sixty millions of people on the two sides of the Atlantic accepted the result, and sang "Te Deums" and "Gloria in Excelsis." "*Multis melior pax una triumphat.*" One such peace is better than many victories, for both sides are conquerors.

Further, this congress of the Seven Powers was itself an international arbitration—a jury empanelled by those nations to decide on what terms the Crimean war should be concluded and others avoided. But would it not have been better to have held the convention before the war commenced? Would it not have been more statesmanlike—a wiser financial policy—to have arbitrated in the beginning—to have put in practice then the eminently sagacious counsel they afterwards gave to the nations?

The Treaty of Peace at Westphalia, after the Thirty Years' War, decided that the Protestant religion had the right to exist as a nationality, a right which the pontiffs, it is true, never have admitted. But could not that question have been determined before, by reason, without so much shedding of blood? Was not the right as real before the war as after? And ought not the pontiff and the Catholic princes to have seen it? The simple fact that there is no need of arbitration now, shows what strides have been since made towards international harmony and peace.

The governments of England, Italy, Sweden, and the United States, in the last two years, have given their moral support to this idea of arbitration *before* war instead of after it. The British House of Commons memorialized the Queen in favour of a conference of the nations for the improvement of international law and a permanent system of international arbitration. To the same effect was the action of the Italian parliament last November, the Chamber expressing its approval unanimously by a rising vote. At its last session, the American congress resolved that the people of the United States, "being devoted to the policy of peace with all mankind, recommend to the treaty-making powers of the government to provide hereafter, if practicable, that in the treaties made between the United States and foreign powers, war shall not be declared by either of the contracting parties against the other until efforts have been made to adjust all cause of difficulty by impartial arbitration."

But the question now comes, can these principles, truth,

justice, and love, so prevail that peace among nations shall become universal?

And why not? Are they not perfectly reasonable? Is not concord among nations immensely more desirable than discord? If general harmony in families and among neighbours, in a state or nation, be not a chimera, why need it be so regarded between neighbouring nations? Is truth impracticable, and only lying feasible, as a prevailing rule? Is justice Utopian, and wrong and oppression the only solid realism? Is love Quixotic, and hate alone capable of universal domination? Nay, these principles, truth, right, love, and the peace that is born of them, are the only substantial and enduring realities. Their prevalence is not simply possible, it is inevitable. They are the only real conquering forces: "*Magna est veritas et prævalebit.*" A lie is always weak against the truth, and craft and wrong, as a finality, always and everywhere, impracticable against right. On this ground, reason, in a free field, is always mightier than the sword; moral force than physical; law and arbitration than the shock of arms. The Duke of Weimar said to Bonaparte: "Your war-policy is unjust; it cannot last;" and it did not. In the same intuitive sense of a justice that cannot be outraged with impunity, Anne of Austria, with a pathetic earnestness, said to Richelieu, of the same world-striding ambition: "God does not pay at the end of every week, *but he pays.*" And in the forecasting spirit of the same profound philosophy are the words of our late Senator Sumner: "There can be no peace that is not honourable, and there can be no war that is not dishonourable."

- The injustice and wrongs of the war-system, however hoary with age, or honoured by eminence, or guarded by the technicalities of law, can find no immunity at the high court of infinite justice. The Eternal is at war with them, and they must give way. The peacemakers are the "children of God," and they will conquer. In that no distant future which the Christian forces are hastening, "nation shall not lift up sword against nation, neither shall they learn war any more." This gives us assured ground of hope.

In the first two centuries of the Christian era, these pacific principles did prevail in the churches, almost without exception. "I cannot fight," said Maximilian to the conscripting officer. "You must, or die; the emperor requires it." "I will die, then; I cannot fight." Principles that prevailed and so ruled in such a community for two hundred years, and made it the brightness and beauty of the nations, can and will rule the world.

But there are other practical phases of the subject that foretell the abolition of the war system.

First. Its *uselessness* and *folly*.

But is not war sometimes useful, and even necessary? If we grant this in respect to a defensive war as a means of self-existence, or of relief from oppressions and wrongs that are next to exterminating, is the war any the less useless and foolish on the part of the aggressor? The stock of arms elicits no new principles, and alters no old ones, and never determines what is right, any more than a pestilence or an earthquake. Incidental providential good may follow both the shock and the earthquake, as it did the malignant acts of the crucifiers. But this is no more a warrant for the war policy than for the crucifixion. To bring good out of good is only to make like produce like. Human ingenuity can do this; but to evolve good out of evil,—through the long ages and wastes of war, to lead the world on to longer ones of concord and brotherhood, making the uselessness and folly of all strifes more evident and more admonitory, and the blessedness of peace-makers more convincing;—this is the drift of providence in the flow of the ages, that fully vindicates justice and explains patience. But this is possible only to infinite administrative power and skill. In this great problem and these processes, evil as well as good is made a wonderful educator, which, as to war, will help make the nations wiser.

Secondly. The *cost* of the war system is a prophecy of its final abandonment. Mr. Field estimates the military establishments of Europe during peace at three millions of men,

and on a war footing, at five millions. These are withdrawn from all productive pursuits ; and as consumers they require for their support, he thinks, the labours of as many more. Here is the loss and the cost to the nations of Europe of ten millions, or about one-fifth of their strength and beauty. And for what ? To be in readiness for war. Is the war policy worth all this ? The Christian nations, it is said, paid during the last year for their standing armies, two thousand millions of dollars, with only two specks of war—with the Carlists in Spain, and the Ashantees in Africa. In a general war, this sum would be increased many fold.

The expenses of the war of the rebellion in the United States to both parties is estimated in the form of debts at its close at about five thousand millions of dollars. And the Franco-German struggle drew still more largely on the belligerents, considering its brevity.

Will these enlightened Christian nations, who are increasing so fast in general wisdom, who are studying so carefully the principles of international law and of national wealth, and so multiplying committees of prudence and finance, continue unabated these extravagant wastes and follies ?

And what is the remedy ? There is but one : disarmament,—reciprocal, immediate disbanding of standing armies, which all history shows are fomenters of war more than preservers of peace. The nations that are best armed have always been the readiest to fight. Let them all disarm by agreement, and in equal ratio, and begin at once, trusting more to reason and less to the sword to find out the right, and they would come at it sooner, and at an almost infinitely less cost.

Thirdly. The *cruelty* and *immoralities* of war foretell its gradual abatement and final abolition.

With all the mitigations that humanity and religion have introduced, war is still essentially barbarous and cruel. When two men engage in mortal combat with chosen weapons and elected witnesses, for insulted honour or any other cause, it is duelling. Once this was deemed valiant and

honourable. Our present civilization decides it to be a barbarity and cruelty not to be tolerated. What makes the difference between two men and two nations? Nothing but magnitude. Battles, except when defensive, are duels on a larger scale, and wars are a succession of them.

To draw up two armies of men, brothers of the same great families, in hostile array; to put deadly weapons into their hands, and bid them slaughter each other, for no personal injury, and no animosities even, when perhaps the real offenders, if there be any, or the projectors of the strife, may be sitting in council chambers, or on a throne, out of all peril; to continue this carnage till one side or the other is so mangled and reduced as to make extermination or submission inevitable; if this be not a cruel immorality, what is? In an age when the civilized nations are seeking how they may prevent cruelty to animals, and are organizing benevolence against it, must not this bloody barbarity towards men be gradually discredited and finally cease?

"War," says an eminent moralist, "is a system out of which almost all the virtues are excluded, and into which nearly all the vices are incorporated." While there have been eminent exceptions—men of rare excellence, who have been distinguished warriors, as there have been men of sound health in a wasting pestilence—yet this is a just characterization of the demoralizing tendencies of war. And is it possible that such a system can dominate the twentieth century of the Christian era, as it has those that have preceded?

Fourthly. The destructiveness of modern enginery tends to extinguish wars by the facility with which it annihilates armaments and armies.

The zeal for inventions in military science, the rapidity of remarkable discoveries, and the deadly effect of certain new implements, are so changing the mode and character of modern warfare, that they are likely, in part, at least, to defeat its objects. They render it more a matter of mechanics, and less one of valour and glory. Inventors in

cannonry and riflery, of iron-clads and ingenious devices for blowing them up, of fortresses and defences, and the means of demolishing them—these inventors are coming to be the real generals, the efficient fighters. Their success has already helped to turn national conflicts of thirty years' duration into three, and of three into less than one, as in the late wars of Prussia with Austria and France. Two armies in battle-array, plying each other with mechanical, chemical, and electrical forces which might be brought into play, would be so mutually annihilative; two fleets of iron-clads, by some wonderful discoveries, might so almost instantly destroy each other, as to make war little else than a mechanical process of human butchery. A few such battles in quick succession would sweep away the entire arms-bearing people of the most populous empires.

In these discoveries it would be difficult for any one nation to keep far in advance of others, as the competitors would be numerous, mutually stimulating each other, and as concealments would be impossible. Thus ingenuity in the evil would hasten its removal. Success in the science of slaughter within the human brotherhood would cast discredit on the science. Turning war from what is muscular and has been deemed manly, to what is chiefly chemical and mechanical—a mere dead, yet deadly, enginery; it would set it forth in its naked ghastliness and horror. This would go far to break the illusion. It would quench enthusiasm, and, together with the uselessness and folly of war, its costs and wastes, its cruelties and immoralities would serve to hasten its extinction.

When the peoples are beginning to think more into the subject, and not merely about it, and the clamours of custom and false glory are disappearing in the new lights that are shining; when they perceive that the toil, and cost, and cruelty come altogether on them; that a nation is so far a *person* as to be held as strictly amenable to truth and justice as any person can be; and that duplicity, chicanery, and wrong in public men and national policy can no more

escape inexorable retribution than in a banking institution or a private citizen ; as the peoples of the civilized and civilizing nations are becoming educated by these principles in the idea of trial by jury—the Magna Charta of human liberty—and of peacefully referring their personal difficulties to the judges of the law and right, will they not, do they not more and more appreciate the truth and justice formulated in laws which are the producers of peace and all real prosperity ?

III.—LAW IN THE UNIVERSITIES.

A LITTLE more than three years ago Mr. Gladstone, fresh from the successful completion of many bold reforms, intimated to the Universities of Oxford and Cambridge, that the time had come for putting their houses in order. The responsible advisers of the Crown had determined that something ought to be known about the révenues of these great institutions, and Mr. Gladstone proposed that if the authorities of the different corporations were willing to aid in the inquiry, the work should be assigned to a Royal instead of a Statutory Commission. The fate of the Irish Church had just then begun to alarm a good many English corporations, and men hoped or feared, according to the inclination of their opinions, that a clean sweep was about to be made of the wealthiest schools in the world. The right of the Government to enquire into these ancient foundations was, however, generally conceded at the Universities, and the colleges, almost without exception, promised to give the Commissioners all the assistance in their power. Accordingly, in January, 1872, seven Commissioners were

appointed to inquire into "the Property and Income belonging to, administered, or enjoyed by the Universities of Oxford and Cambridge, and the Colleges and Halls therein (whether held for their corporate use or in trust, or in whatever other manner), including the prospects of increase or decrease in such property and income; and also to report the uses to which such property and income are applied, together with all matters of fact tending to exhibit the state and circumstances of the same." For nearly three years the Commissioners have been engaged in collecting information from the societies falling within the scope of their instructions, and they have now presented their report, accompanied by a mass of returns, showing in detail the sources of College revenue and the mode of its administration. The Commissioners appear to have taken a narrow view of their authority to report on the "uses to which such property and income are applied," and have confined themselves almost entirely to questions of book-keeping and management of estates. There is only one vague and timid allusion to the "great disparity between the property and income of the several colleges and the number of the members," but the only conclusion suggested by the Commissioners is that in small colleges the expense of staff and management is of course large in proportion. But if the Report is meagre in suggestions, it is full of most important and interesting information, and quite realises Mr. Gladstone's anticipation that it would prove to be useful and valuable to the public and Parliament, as well as to the members of the two distinguished bodies themselves. The latter ought to be very grateful for the Commission, as it enables them to know for the first time in many cases what their financial position really is. In the Colleges, as in all old corporations, we should suppose that few of the members really knew where their funds came from, or how they were being managed. The business of administration fell into the hands of the Head and the Bursar, and the Fellows usually had only dim notions about the situation of their

estates or the value of their rents, or the condition of their tenantry. All this is now made as clear as paper can make it, and all persons interested in the Universities and Colleges will be able to tell, with some approximation to the truth, what is the amount of their revenues, and how they have been managed. The report will lay down the basis of fact which is necessary to any practicable scheme for the re-distribution of academical property. The air is alive with proposals of reform, and the representatives of every form of education and every kind of knowledge, are pressing forward their claims with increasing vigour. In this strife of studies the humble pretensions of legal education should not be forgotten. Law is not so insignificant a subject, nor is the study of law organized in such a perfectly satisfactory manner, that we can afford to look on with indifference, while educational endowments in which we are directly interested are being handled by other people. The English Universities have always professed to be, and to some extent now are, Schools of Law. Legal Studies have not yet got a secure footing in the Universities, but such as it is we believe it to be of importance that it should not be lost. In a magazine devoted to the interests of Legal Science we need make no apology for calling attention to an authoritative description of the endowments of Oxford and Cambridge.

The commissioners thus briefly sum up the results of their inquiry: "The total income of the Universities and Colleges in the year 1871, as shown in the synoptical table, was £754,405 5s. 1½d.; of this sum £665,001 10s. 2½d. was for corporate use, subject to conditions of trust. The income belonged to the different bodies on the portions shewn in the following schedule.

	Corporate.				Trust.		
	£	s.	d.		£	s.	d.
University of Oxford	32,151	4	0 ...	15,437	19	3	
University of Cambridge	23,642	19	5 ...	10,407	17	10	
Colleges & Halls of Oxford	330,836	16	1 ...	35,417	0	2	
Colleges of Cambridge	278,970	13	8½ ...	27,504	17	8	
	£665,601 10 2½				£88,803 14 11		

As the "trusts" are in almost all cases educational, the distinction which the Commissioners have emphasised all through their report, is after all of no great importance, and we may take it that Oxford and Cambridge have together £750,000 a-year to spend on the higher education. Part of this revenue is derived from what the Commissioners call internal sources of income, meaning thereby sources of income arising within the College walls as distinguished from those arising without. Why the distinction was drawn precisely here we cannot profess to see, for it has had the effect of mixing up what is endowment and what is not endowment in irredeemable confusion. The Commissioners cannot have meant to imply that for any reasonable or likely purpose whatever, the revenue arising from the College buildings may be regarded as different in character from the rents coming from College land, or that fees and room-rents are in a College account to be taken as payments of exactly the same kind. What we wanted to know most of all in this inquiry was the amount of University and College endowments; and we do not find any clear and succinct answer in the Commissioners' returns. The whole "internal income," however, is returned at £614,587 7s. 6½d., and something more than this may be taken as the sum at present available as the revenue of academical endowments. In most cases the revenues are steadily rising, and in the course of ten or twenty years most of the existing beneficial leases will have been run out. Within the century, the revenues of the two Universities will together amount to something like a million a-year. In addition to this, Oxford and Cambridge possess the patronage to ecclesiastical benefices, producing on the whole nearly £350,000 a year. The whole of this patronage is the legal property of the respective corporations, and as the livings have in many cases been purchased out of the corporate funds and in others devised as an estate might be devised, under no other trust than which is imposed by the educational character of the Colleges, it must be looked upon as an endowment available for purely

educational purchases. College livings were till lately College pensions, because the tutors were necessarily in orders, and College money was regularly being applied to increase the endowment of the poorer benefices. The ecclesiastical property must therefore be added to the University and College estates, in estimating the value of these magnificent endowments. What is to be done with them now is perhaps the most important public question of the day, and the friends of legal education are far from being uninterested in the answer.

It has long been felt that the existing mode of distributing academical revenues, is by no means the best that could be devised, and we may be certain that the late ministry intended, and that their successors intend that the Report of the Commissioners should be followed by proposals for reform. Whether Parliament will take upon itself the burden of legislation or devolve it upon the corporation themselves, it is pretty certain that extensive changes will be introduced. What part of the university system is in greatest danger, or in greatest need of reform, may be seen by a glance at the synoptical tables, drawn up by the Commissioners from the returns submitted by the Colleges. We ~~can~~ confine ourselves at present entirely to the College returns. The nineteen Colleges of Oxford are returned as possessing, in 1871, a corporate income of £325,735 per annum, and a trust income of £35,472. We need not here take any account of the large expenditure written down under such heads as the following :—investments, improvements, rates and taxes, maintenance of establishment, subscriptions and pensions, College servants and officers, &c. Such expenditure, is probably unavoidable so long as the College system exists. What may be described as the revenue available for distribution is apportioned in the following manner:—

The heads of houses receive	...	...	£29,972 *
Fellows	...	...	101,171
Scholars and exhibitioners	...	...	25,514

The above are the items common to all the Colleges, and

swallow up by far the larger share of the distributable revenues. To the expenditure on scholars and exhibitioners must be added the sum of £14,851 from the trust funds, making a total of £40,365. Among the items peculiar to several Colleges are the following:—

University Professors	...	...	...	£6,694
Tutorial Fund	...	...	...	4,411
Augmentation of Benefices.*	...	...	...	8,772

The Cambridge returns dealt with in the same way yield the following results. In the seventeen Colleges, in 1871:

The heads received	...	...	...	£20,415
The fellows	...	...	...	102,976
The scholars and exhibitioners	...	...	...	24,308

As before, the last item should be supplemented by the sum of £4,505 from the trust funds, making a total for scholars and exhibitioners of £28,873.

University Professors received	...	...	£1,001
Tutorial funds ..	...	...	2,642
Augmentation of benefices	...	...	5,233

One or two points of differences between the two Universities may be noticed in these results. In Oxford the contributions made by the Colleges to the University Professoriate are considerably greater than in Cambridge. • Oxford spends rather more than Cambridge in aid of what are called tutorial funds, and considerably more in payment to undergraduates. The returns as to augmentation of benefices is probably as little to be depended upon in the one case as in the other, and in both cases it will be necessary to institute a much more searching investigation. Excluding the permanent charges already mentioned, and leaving out

* There is good reason to believe that this last item is wholly untrustworthy as indicating the amount of College revenues devoted to the purpose of increasing the value of benefices. For example, Magdalen College is returned in the synoptical tables as paying £17 10s. for augmentation of benefices, but we find, on turning to the abstracts of returns, that the College leases to incumbents of livings in the gift of the College tithes^a rent charges to the awarded amount of £7,405 18s. 7d., at a reserve rent of £954 6s. 6d. This is by no means the only instance of the kind.

of sight the comparatively insignificant amounts expended in support of the professorial and tutorial staff and the quite unascertained expense incurred in the augmentation of College livings, we find the net result to be that Oxford and Cambridge together spend about £50,000 a year on Heads of Houses, rather more than £200,000 on Fellows of Colleges, and something like £70,000 on Scholars and Exhibitioners. The average received by each beneficiary appears to be nearly the same at both Universities, although at Cambridge there appears to be a greater variety in the figures of the different Colleges. In Oxford an undergraduate scholar receives on the average about £80 a year, a Fellow about £250, and a Head about £1500.

The returns of the Universities as separate corporations need not detain as long. Oxford has "external income" as it is called, amounting to £13,605, an internal income (fees on examination, graduation, &c.) of £18,545, and a trust income of £15,437. The corresponding figures for Cambridge are £3,509, £23,642, and £10,407. With these sums the universities pay professors, teachers, and examiners, provide scholarships and prizes, and look after libraries and museum. It is not likely that the application of these funds will be in any way challenged. The Colleges are not equally safe from criticism.

We have seen that the Heads, Fellows, and Scholars consume between them much more than half the net College revenues. The conditions on which these emoluments are enjoyed by the beneficiaries are almost too well known to need description here. The head is the titular ruler of the Colleges, but his duties consist chiefly in presiding at College meetings, and his authority is little more than that of a Fellow, with the casting vote of a chairman. He does not usually teach, and his share in the discipline of the society is occasional and dignified rather than habitual and effective. The Fellows are elected by the College out of the most distinguished young graduates in the University: at Oxford after an examination of unimpeachable fairness;

at Cambridge according to the results of the public examinations. The Scholars and Exhibitioners are also for the most part elected by examination without any condition as to creed or place of birth. The Fellows are not required to teach, but as a matter of course the Tutors are chosen from the Fellows. But a fellowship imposes no duty whatever upon its holder, except usually that of not getting married, and not getting rich. Various alterations have been introduced of late years, but this sketch of a college corporation remains true in all its main particulars. Excepting the sums paid to the tutorial fund, and to the University professoriate, and excepting also so much as may be credited to the fact that the Tutor being a Fellow, is disposed to count his Fellowship as part payment of his work as Tutor, the College revenues are not spent on education at all. They are spent in helping young men to pay for their education at the University, and in paying them for having been educated well. The sarcastic language of the severest critics of the system is after all a tolerably correct description of the existing state of things. At the universities each student pays for his own tuition, the only exception being the free lectures of some of the endowed professors. But the real work of education is being carried on by tutors, unendowed or endowed who are paid in whole or in part by fees received from their pupils. The College funds go to assist young men to pay the expense of such an education as the Universities afford, and to reward them for having bettered by their instructions. And the persons thus tenderly dealt with have hitherto been, with some miraculous exceptions, the children of the upper and middle classes of society.

We need not anticipate the countless criticisms which the publication of this Report will provoke. The highly paid institution of the headship, which does not even serve as the reward of successful service in the Colleges, has long ago been condemned. The sinecure or Prize Fellowships have almost ceased to have defenders among the Fellows themselves, but we should not wonder if they proved to be much

less unpopular in the country than university men are apt to suppose. That an income for life is a disproportionate prize for success in a single examination will not have much weight with those who look upon the College fellowship as a splendid encouragement to youthful ability and industry, as an honourable aid in getting over the early difficulties of the higher professional careers, and as an effective means of introducing into the professions a fair portion of the best culture of the Universities. That the system will be utterly rooted out we do not believe, but the public opinion of the Universities will no doubt force on material changes in the value and tenure of the fellowship, if not in the academical status of the holders. The fact that an immensely large proportion of the lay fellows in the University become members of the bar—that their fellowships are in a sort of way legal scholarships—gives lawyers a direct concern in the decision of this question. If the prize-fellowship cannot remain as it is, the clerical fellowship of course is doomed altogether. What is to be done with the revenues likely to be set free by the most moderate of the changes we have just indicated?

—We are at no loss for an answer. Some have boldly demanded that the surplus revenues of Oxford and Cambridge should be divided among the larger towns, in order to enable them to support small Universities of their own. The friends of female education have declared that endowments have hitherto most unjustly been confined to one sex, and that the want of higher schools has operated most injuriously upon the intellectual character of women. Without claiming admission for women to the Universities, they ask that in any new apportionment of College funds to educational purposes, some account should be taken of boys as well as girls. On the other hand, if the question ever comes prominently before the public, there will be something to say about the exclusiveness of a system which practically confines its grants in aid of education to people who could very well afford to do without them. It has been

said, that while sixty per cent. of the students of a Scotch University are sons of working men, the proportion in an English University would hardly be more than one in a thousand, and that one would probably turn out to be a Scotchman.* Now that elementary education is rising in tone as well as extending in area, the demand will soon be made, that the pupil of the Board School should have the path to and through the University made as easy to him as it is to the pupil of the Endowed Public School. In the system of unattached students flourishing at Cambridge, and rapidly extending at Oxford, the promoters of this view of University Reform have the machinery ready to their hands, and a really public hearing is probably all that they require. But the most formidable claimants are that small knot of men of science and men of culture who, following up the pregnant hints of the Rector of Lincoln, have declared open war on education, and require that the University funds shall be appropriated to the endowment of research. Instead of helping to pay Tutors and Professors for teaching undergraduates, and undergraduates for submitting to be taught, and Fellows for having profited by this teaching, the revenues of Colleges shall go to support young men of science, who will occupy themselves with the investigation of nature, and with that alone. Research not education is pronounced to be the proper business of the Universities. There shall be no sinecure fellows, and no more endowed teachers. Even the endowed investigator shall not be required to teach. His sole business is to be the discovery of scientific facts. The scheme it must be said is rather a gross rendering of the graceful version of its original author.

We mentioned these different proposals, not by way of submitting them to criticism, but by way of putting clearly before our readers the existing situation. One of them, we feel confident, may be dismissed at the outset as unworthy of consideration. We do not believe the country will even consent to alienate the revenues of the Universities until it has been clearly proved that the Universities are unable to

turn them to good account. There will be no surplus revenue until the powers of Oxford and Cambridge have reached the utmost limit of their expansion. At this moment their history may be said to be only beginning. What under manifold restrictions they have been to a section of the people that and more, under a more liberal constitution, they may be to the whole nation. To say that it is unfair that Oxford should have so much endowment and Manchester so little is saved from being nonsense only by being understood in the sense which would probably leave Manchester very much worse off than it is now. The redistribution of local wealth is a principle not likely to be confined to Colleges alone. Oxford and Cambridge are not local schools, and we should be sorry to see any number of local schools substituted in their place. Nor do we believe that the scheme for endowing Research will materially alter the constitution of the University. It may be recognised by such provisions as those inserted in the new statutes of Balliol and New College, Oxford, by which power is given to pay annuities under certain conditions to persons engaged in investigations likely to end in useful discoveries. But it will never get possession of the University to the extent contemplated by its promoters, and we doubt if it will ever be the serious rival of the Prize Fellowship. We may take it for granted that the business of the University will still continue to be education, and that academical revenues will still be applied to educational purposes, although there may be many changes in the mode of their application. Holding that the profession of the law has a deep interest in these changes, we invite the attention of lawyers to the problem now before us. We have a vested interest in the Universities, not only through the Fellowships by which the bar is so abundantly recruited, but through the system of legal education already existing there. The governing bodies and the profession and the Universities have long before now tried to come to terms, and to those who are really interested in legal education nothing can be more important than to secure the efficient co-opera-

tion of Oxford and Cambridge. In a second paper we shall show, briefly, what the Universities are doing for us now, and what we very fairly ask them to do in the future.

IV.—ON THE LAW AND PRACTICE OF ENGLAND AND SCOTLAND IN AFFILIATION CASES.

By HUGH BARCLAY, LL.D., Sheriff Substitute, Perth.

[The writer of this article was requested by the officers of the Jurisprudence Section of the Social Science Association to write a paper to be read at the October Congress in Glasgow. He made choice of the above subject with the hope of obtaining the opinions of legal gentlemen belonging to both sections of the United Kingdom. By some unfortunate circumstance the paper was not read at the Meeting; but is now made public through the medium of the *Law Magazine*. The writer was chiefly indebted for English Law on this subject to the treatise on "The Law and Practice of Orders of Affiliation," by T. W. Saunders, Esq., Recorder of Bath, (sixth edition). He has also to acknowledge the kindness of that gentleman by affording him further information on points of difficulty.]

THE laws which regulate judicial procedure for fixing the paternity of illegitimate children and their support on the putative father are of importance beyond the parties to the suit. They have a social bearing of far greater importance. The character and standing of the man on whom the claim is sought to be fixed are at issue, often affecting the peace of families. The *status* of the child is also involved, sometimes raising questions of succession. Of wider influence the morals of the community are concerned in the repression of vice, and in preventing falsehood often sealed by perjury. All this may be defeated either by an over-strict or an over-lax formula of procedure. By the one, the real father may escape, and a burden, the result of his guilt, be wholly thrown on the mother, who not unfrequently seeks to escape by the neglect and even infanticide of her offspring. Frequently the support both of mother and child is thrown on public

resources. In the other way, but, I believe, much more rarely, an innocent man may not only suffer in his means, but, what should be of far greater value, in his character and prospects.

The enquiry has become all the more important because of the great increase of illegitimacy in recent years. From the Report of the Registrar General of England for the year 1870, the illegitimate births registered was 44,737, being 5·6 per cent. of all the births registered for that year. In Scotland the ratio apparently is greater. By the Report of the Registrar General for that part of the Kingdom in the ten years 1861-1870 inclusive, of 1,120,791 births, 1,010,730 were legitimate, and 110,061 illegitimate, being 9·7 per cent. of the former class. This, however, for the sake of the credit of Scotland is more apparent than real. Happily since the year 1854 we have had an admirable system of compulsory Registration (17 & 18 Vict. c. 80). We understand that most essential element of statistics is faulty in the South, being there rather a Register of Baptisms than of Births. The Scotch Tables further contain very curious and startling facts as to the great difference of illegitimate to legitimate births uniformly found in certain districts. The general proportion, as has been said, is 9·7. But whilst some districts contribute thereto so small an amount as 4 and 5 per cent., in other districts the proportion mounts up as high as 16·1 and 16·2 per cent. Here is a very interesting field for enquiry to the Social Statist, and the Moral and Religious Reformer, but which is outwith the domain of the Jurist.

There is a most marked distinction between the law and practice of the two countries in this important department. It is my object briefly to state where these differ so that attention may perhaps be directed to their respective merits or blemishes with the hope of amendment in both. These laws in both sections of the kingdom have been changed from time to time. At one time bearing very hard on the mother claiming support, and at other times unduly adverse

to the man from whom support is claimed. A recent alteration in the law of Scotland which, it is believed, was wholly unintentional, has in my experience been most detrimental to the mother claiming support, and otherwise instrumental of admitting gross perjury and otherwise destructive of public morals.

In dealing with the law and practice of England, I am venturing on foreign ground, and should I commit any mistakes our professional friends on the other side of the Tweed will at once correct and forgive me.

1. In England all cases of affiliation are adjudicated on by Justices of the Peace, and that, according to *statute law*, incorporated with the poor law, and conducted under certain peculiar prescribed forms of procedure. In Scotland these cases are dealt with entirely at *common law*, in the same way as any other civil debt or claim. Justices have with us at common law in such cases a jurisdiction, but which is now very seldom or never exercised. The claims of aliment are brought in the Court of the Sheriffs. The only statute law which interferes with the claim is the Poor Law Amendment Act, 8 & 9 Vict., c. 83 (1845). This only comes into operation where the child has become chargeable on the parish, and then the parochial board is entitled to prosecute, criminally, the putative father for neglect, who has either acknowledged the paternity or on whom it has been judicially fixed, he being able to contribute his share of support. He may be fined and imprisoned for a certain period. But no order on the suit of the Poor Law authorities is sanctioned by statute for the future support of the child, as is provided under the English law. In England the Poor Law authorities can at any time apply to two justices for an order on the putative father for future aliment, and which is enforced in the same manner as on the suit of the mother. In the year 1873 there were 126 criminal prosecutions in Scotland at the instance of parochial boards, and 61 convictions of putative fathers for neglect to contribute for the support of their children, and who had

thus become chargeable to the parish. In respect of the titles of the Poor Law authorities to obtain an order for future support of the child, the law of England is superior to that of Scotland.

2. The statute law of England, dealing with the support of bastards, goes back so far as the 18th of Elizabeth, (c. 3, s. 2.) The 4th & 5th William IV. c. 97 (1834), was the ruling statute, for a long time, amended by the 7th & 8th Vic., c. 101; and 8th & 9th Vict., c. 10. The former statutes were superseded by the Bastardy Laws Amendment Act, (1872,) 35th & 36th Vict., c. 65. This last statute containing (no extraordinary fact in legislation) most egregious blunders, called for an amendment of the Amendment Act, (1873,) 36th Vict., c. 9. As has been already noticed, in Scotland there is no statute regulating the claim of affiliation with the single exception of the *criminal* prosecution for neglect. The claim in Scotland, with its peculiarities, is left to be dealt with at common law in the same manner as any other claim of civil debt. Here the law of England is in advance of that of Scotland, in its having a summary jurisdiction for such claims.

3. In England (35 & 36 Vict., c. 65, s. 3) a single woman, with child, may, on oath, apply to one justice, stating who is the father of the child, for a summons against him. But in this case the day of appearance must be fixed on a day after the birth of a child. In Scotland no claim can be made judicially until after the birth. If, however, the putative father is proved to be about to leave Scotland, he may be proceeded against, as in *fuga*, on the oath of the mother, supported by some evidence, not of the paternity, but of his intended flight, and he may be put under caution, *de judicio sisti*, to answer to an action for aliment to be brought after the birth of the child, within a time specified—generally six months. Under this head the practice in Scotland seems to be the best. It answers the ends of justice, and does not run the risk of a false issue in the not unfrequent case of no child being born.

4. In England the mother may apply to one justice for a summons against the putative father any time within twelve months from the birth of the child, or at any time thereafter, but only on proof that the man within the first twelve months paid money for its maintenance, or was absent from England during these twelve months and had only returned twelve months before the application. In Scotland there is no restriction of time and no prescription or limitation of the claim and action which may be brought any time within the long negative prescription of forty years. In one case in Scotland a mother was successful in making good her claim after a delay, in one case of thirteen years, and in another of fifteen years. 7th July, 1809, Finlayson, Fac : Col: 426, February, 1842. Thomson 4 D., 833, 6th Dec., 1852. Lamb, 5 D. 248. The limit of time in the case of the mother does not apply in England where the order is sought by the parish authorities. *Mora* may form a strong presumption against the validity of the claim. There is certainly an advantage in compelling an early resort to law. The loss of evidence, however, is likely to tell more against the claimant than the respondent. Here the law of England may have an advantage over that of Scotland by compelling an early application for redress, and it might be well to have some such limit in Scotland, but certainly of greater space than twelve months.

5. In England the application for a summons need not be in writing, but generally it is so, as a form is prescribed by statute. A summons thereon is issued citing the defender to appear at petty sessions on a certain specified date and place, the interval being at least six days, and within forty days from the date of the summons. Elaborate forms of procedure have been framed by the Local Government Board under authority of the Act 1872. In Scotland the action is brought by a summons in the form adapted for all civil claims on an *inducrae* of six days which comes into court on the next ordinary Court Day.* A copy of the summons is served personally or left at the defender's usual place of abode

by an officer of court, accompanied by one witness, and a formal declaration of the fact called "execution" is indorsed on the original summons, and is held the only evidence of citation unless challenged as false. The *formula* adopted in England before justices would be found altogether inapplicable to Scotland. But a more summary and economical form of procedure in such cases in Scotland is imperatively demanded than what is suited for ordinary cases of debt, which, unlike a demand for instant support, may abide the proverbial slow progress of judicial procedure.

6. If the defender in England fail to appear on the day named in the summons the justices take the oath of the party who served the summons of that fact, and then the sessions proceed *ex parte* to hear the evidence of the woman and other corroborative proof, or may adjourn the hearing. In Scotland if appearance be not entered by the defender by a notice lodged with the Clerk either by himself or an agent, decree is given in absence and without evidence. Against this decree the defender may be reponed at any time until the decree be implemented voluntarily or by legal execution. The procedure in Scotland does appear to be best suited to the ends of justice, as the trial of a case, and especially one of so much delicacy *ex parte*, cannot be held satisfactory. The genius, however, of the English Law is adverse to decrees in default.

7. In England, either on appearance of the defender, or in his absence, the justices proceed to investigate the case, taking "the evidence of the woman and such other evidence as she may produce, and any evidence tendered by or on behalf of the defender, and if the evidence of the mother be corroborated in *some material particular* by other evidence to the satisfaction of the justices," an order for payment is issued against the defender. In England the mother's oath is always essential in evidence, and the defender may be a witness either called by the mother or by himself. In Scotland, where appearance has been entered, a record is made up, as in other ordinary causes for

debt. In some courts this is done by a short defence of denial. In others, and generally, a full record is made up of averments and admissions or denials by each party alternately in shape of condescendence and defences. The proof on both sides is taken by the sheriff in writing. Parties are thereon heard *viva voce*. The sheriff substitute gives judgment condemnatory or absolvitory. There is an appeal allowed, and generally taken, to the sheriff principal and not unfrequently to the Court of Session, and it is open even to the House of Lords. In all this there is very great delay and very much expense. Often the defendant suffers as much in costs as would suffice to support the child to mature manhood, and very frequently, with exhausted means, the burden is thrown on the parochial board. The procedure in England appears recommended for economy and dispatch that in Scotland requires amendment to ensure a speedy and less costly decision with due regard to the paramount interests of justice. Seeing that in Scotland the jurisdiction is exercised by skilled judicial functionaries, and that evidence in this class of cases is generally circumstantial, there may exist some reason for no longer entrusting such cases to the ever-shifting and non-legally trained justices in England, but transferring the jurisdiction to the County Courts, which have been so far borrowed from the ancient Sheriff Courts of Scotland, and have obtained the confidence of the public.

8. In England the order when given is on the father to pay towards the support and education of the child, a weekly sum not exceeding 5s. each week, with the expenses incident to the birth and funeral, if the child has died before the order, and with costs. If the father fails to implement the order on certain farther proceedings the same may be recovered by distress and sale of his goods, and, failing such recovery, he may be committed to gaol for a term not exceeding three months, unless the sums with additional costs be sooner paid. In Scotland decree is given for child-birth expenses and aliment. The rates unfortunately vary in different counties, and are slightly increased with the rank

of the father. This last obviously is not wise as forming an inducement to a woman to select, not according to truth but on ability of the man to give support. The common allowance in Scotland is 30s. for the expenses attending the birth, and 30s. for each of the three first or nursing quarters, and 25s. for each subsequent quarter (that is about 2s. 6d. in the week), payable quarterly in advance, with interest, until the child, if a female, reaches the age of ten, or if a male seven years. At these periods the father may claim the custody unless good grounds of objection can be shewn, and if the custody be refused, the mother's claim of aliment ceases. The rates are supposed to be one-half of the actual cost of support, the mother contributing the other half, either by her nurture or in money where the child is given in charge to a third party, which last is not uncommon. The recovery of the sums awarded is as in any other ordinary claim of debt. Pounding and sale, or distress of moveables, is the usual procedure, but the great proportion of this class of defenders have none to attach. They may be imprisoned, but only as civil debtors. Claims of aliment of whatever amount are specially excepted from the statute abolishing civil imprisonment in Scotland for debts under £8 6s. 8d. (£100 Scotch money), 5 & 6 Wm. IV., c. 70. Imprisonment for debt still exists in Scotland for sums upwards of the above stated sum, though abolished in England, except on commitments from County Courts. The mother, instead of obtaining aliment for her child, has under an old Scotch statute (the Act of Grace) in her turn to aliment the father in prison at so much each day. He may ultimately get liberation by the process of *Cessio Bonorum*, but only on finding caution for the future aliment of the child, it may be at a reduced rate than what was awarded by the Court. There is no penal coercion save what has been already mentioned where the support of the child has been thrown on the parochial board, and the defendant has been proved to have been able to contribute to its support. Where the father has been imprisoned in England the mother is not obliged to

find him in ailment as in Scotland. He or his friends may provide such, and if unable, he is supplied with the common prison dietary at the public expense. In England (though still undecided) the opinion is that imprisonment cancels the claim for which the man suffered imprisonment, but leaves the future aliment intact. In Scotland the imprisonment of the father does not cancel any part of the claim, but where he obtains *Cessio* such protects from imprisonment for bygone, but not for future aliment. Under this head the law of England is, in some respects, preferable to that of Scotland.

9. In England it has been now settled that a woman, who has failed in her first application, may repeat her application. An appeal is allowed where an order is given, but none is provided where refused. Hence it has been decided that the refusal is more of the nature of a nonsuit than of an adjudication. No doubt the first refusal has weight in disposing of a renewed application unless supported by additional evidence. In Scotland an appeal is allowed alike against a decree absolutary as against one condemnatory. The final decree of absolution is *res judicata*, and bars all farther process. The advantage in this point we claim, seeing that a party should come prepared with all possible evidence, and it is hard to keep a defendant under the torture of so delicate a claim. It also opens the door for a defeated party to get up farther evidence regardless of truth.

10. In England an appeal may be taken within twenty-four hours after the adjudication, from Petty to Quarter Sessions, on the appellant finding caution for costs. In Petty Sessions either party may demand a case entirely on points of law, to be laid before any one of the Superior Courts of law. On any legal defect on the face of the order a writ of *certiorari* from the Queen's Bench may be obtained. In Scotland, where alimentary claims have been brought before the justices, an appeal was open to the Quarter Sessions, which is a court little recognised in Scotland. These claims are now generally brought before the Sheriff.

An appeal, as has been said, is allowed to the Sheriff Principal by either party, and thence to the Court of Sessions, and that without any surety for costs of appeal. The review allowed in England is very cheap and expeditious. That in Scotland is very costly, tedious, and often unsatisfactory. We greatly lament the want of stating cases to our Supreme Court, who cannot interfere in most statutory cases, unless where serious errors in form have been committed. Every county in Scotland, therefore, rejoices in its own law of road, public houses, game, and such statutory offences confided to the jurisdiction of the justices. A better mode of dealing with cases of paternity might safely and wisely be introduced into both countries.

II. The most important enquiry in this branch of law, and that which induced me to write this paper for the consideration of the legal profession, is the nature and form of the evidence necessary to support the mother's claim, and without which it falls to be negatived. In England the mother's oath is first admitted to the paternity, and the order is given, "where her evidence is corroborated in some *material* particular by other evidence to the satisfaction of the justices." It is believed that one witness in England, as with us, is sufficient to corroborate. What is a material fact of necessity is left to the judgment of the court. This depends much on the status, ages, and character of the parties, and the customs and usages of the locality. Therefore it is wisely held that in this class of cases precedents are of no authority, as what would be justly held material in one case might be quite immaterial in another. In England the defendant may be called as a witness by the mother, or he may offer himself, as such for himself. The evidence, in the Petty Session, is not reduced to writing, unless where it is to found an order of commitment to prison. Notes are frequently taken so as to guide to the after examination of the witnesses. On an appeal to Quarter Sessions the same witnesses may be re-examined, and other witnesses, for the first time, called on either side, which renders the appeal an original case. In

Scotland the evidence is always reduced to writing at the first, and forms the only ground of judgment in the appeals; unless in some very rare cases on strong grounds, additional evidence is admitted in explanation or contradiction.

In Scotland, up to the year 1853, when the evidence Act, 16 Vict., c. 20, introduced the law of England on that matter, the form of procedure in this class of cases was peculiar, and reflected much credit on the sagacity of our ancient jurists. It was well designed at once to protect the innocent and convict the guilty. Before the above date parties (and at one time relations within certain degrees) were not admitted as witnesses either for or against themselves. They could only be put on oath on a reference to that sanction which was and still is held a judicial contract shutting out all other evidence. In some few cases, however, where sufficient ground was laid, but which of necessity did not amount to the full degree of evidence to support a claim, the claimant's oath in supplement was allowed to complete the evidence. Cases of affiliation were admitted to this category. On the record being made up and closed, (and sometimes before that stage, though such premature proceeding was judicially reprobated) the defender was called on to undergo what was termed a judicial examination in presence of the court. An examination was taken, but not on oath. This declaration was held as good evidence as against the declarant, but nowise for him. His declining to answer questions, or his pleading forgetfulness of recent matters, were taken as strong points against him. This mode of investigation is expressly reserved in the Evidence Act, 1855, and has been approved by the courts 15 January, 1842, (Wilson.) 2nd June, 1843, (Kirkpatrick.) It, however, is very seldom resorted to, and the woman generally calls the defendant as her first witness before he has the opportunity of hearing the evidence of herself and other witnesses. The parties were then sent to probation. The Pursuer adduced evidence of facts and circumstances especially occurring between six and ten months of the birth of the child. The defender was entitled to lead evidence to

the contrary, and, if averred on record, to prove her familiarity with one or more men during the said period. Neither party to the suit was examined as witnesses. Parties were heard on the concluded proofs. If the evidence amounted to what was called a *semi-plena* then and only then was the mother admitted to her oath in *supplement*. What amount of evidence made the necessary *semi plena* of course varied in each case. One distinguished judge (Lord President Blair, in Craig, 14 June, 1809) stated it as raising a "*reasonable belief*," though not complete evidence that the defender was the father. Another judge (Lord Gillies in Mc Crone, 9 June, 1831, 98 S D B 692) defined it "*as less than proof, but more than suspicion*." A third judge (Lord Robertson in Hutchison 8, July 1826, 6 S D 1131) held it to be a "*reasonable suspicion*," and a fourth judge (Lord Mc Kemzie in Glendinning, 17th January 1835, 18 S 270) held that it must be "*the probability that the defender, and no other man, was the father*." Lord Justice Clerk (Inglis) in Bruce v. Petric 23 November 1841, 4 D 49, observed that the oath in supplement is allowed to supply defects in an otherwise inconsistent statement, not to cast the balance in a case of contradictory evidence and facts. (See Dr. Frarer on Parent and Child, (2nd Edition, p. 133.) A *semi plena* being found, then and only then, was the woman's oath admitted to complete the full complement, to carry up the *semi* to the *plena*. If her oath coincided with the previous proofs, that is, if the two halves dovetailed together and made one concrete or whole, she obtained judgment. If she contradicted her witnesses and destroyed the unity or cohesion, then she lost her cause. This sometimes but rarely occurred, as in McNaughton 7 July, 1837 and 9 June, 1838, 16 S 338, Greig, 28 June, 1848, Folley 10 D 1424.

The "Evidence Act of 1853," admitting parties to be witnesses, made some exceptions, obviously because involving questions of *status* the inducement to perjury was great. Accordingly all cases affecting marriage, with the addition of "Legitimacy or Bastardy," were excepted. At first sight it might appear that cases of paternity or affiliation fell under

this exemption, but the context has been held to imply that the cases of "bastardy" expressed were declarators of *non* legitimacy. The court has, even in a question of entail, where legitimacy was only incidentally referred to, refused to allow parties to be witnesses (14th February, 1855, Sandilands's 27 Jurist, 178). From parity of reason this should place cases of affiliation in the same category. It has not unfrequently occurred that actions have been brought by married women against men other than their husbands, and where the woman has been allowed to swear to her own turpitude. But the court, in such cases, whilst fixing the aliment on the stranger, has reserved the right of the child thereafter to maintain its legitimacy. The Evidence Act, to the surprise and regret of the judges, having thus swept away the very ancient law of *semi plena*, the consequences have been disastrous. Now almost every case of affiliation is opposed, since it has now become a wide-spread opinion in certain classes, that all the man has to do is to swear to *non* connection, and then he must be liberated from all claim. In almost every opposed case there is oath against oath, and, therefore, there exists no manner of doubt that there exists gross perjury on one side or the other, and in my experience almost always in that of the man. The matter at issue is, of course, of an occult nature, and, therefore, it is difficult to convict the man of perjury, even though, in the civil cause, he has been disbelieved. Consequently very few criminal prosecutions have been attempted, though there existed no manner of doubt of the perpetration of the crime which above every other looses the moral tie which binds man to truth and probity, and lets in every other offence. Where there exists meagre proof of familiarity between the parties, within the prescribed period, and where there is oath against oath of the parties, I have been grievously pained in absolving the man because of want of legal evidence, though satisfied morally of the truth of the mother's claim, and the deliberate perjury of the man. Such a result would not have arisen under the olden mode of procedure. It has been

remarked that in general the woman is in the right. She has already suffered in her character and has the permanent burden of the child, and must, whatever be the issue, continue to bear the one half of the cost of its support. The man has his character as well as his purse at stake, and by perjury he seeks to liberate himself at once from the stain of guilt and any contribution for the child. The temptation to false swearing is, therefore, of double force on the man. Another side issue is often raised in these cases. The defender avers that othermen, one or more, have had access to the pursuer during the legal period. He produces these men, who now can safely swear to their guilt because that the woman has fixed, on oath, the paternity on another, and these scapegoats may roam at large in safety. The only ground of suspicion against the woman is where the action is directed against a person of some wealth, and, in defence, one of comparative poverty is alleged as the true father. This seldom, in my lengthy experience, has occurred, for generally the parties who are set up as likely, parents are of the same class, and that of the labouring ranks. It is quite possible that with women of very loose habits (but who rarely become mothers) there may be a difficulty on the mother definitely selecting the true author of her pregnancy. But my conviction is that she seldom, if ever, fixes on a man who at least *might* not have been the father of her child. A point in evidence is well worthy of notice. In both countries physical likeness of the child to the putative father is now never admitted, as considered too loose and capricious. (See 20th June, 1810, and 19th May, 1812, *Routledge v. Carruthers*. House of Lords.) But there is no doubting the fact that such similitude does exist, and is often very marked. In one case which was known to the writer, a defender escaped, on proof by medical men that the child was the offspring of a coloured man, which the defender was not. He has also known cases of peculiarity in the formation of some of the bodily members which were similar to the same on the defender. Yet such evidence

could not be received. It would never be asked to decide on such mere similarity, but it may surely be allowed as an element in corroboration of other evidence of intimacy and familiarities where direct proof can never be expected. An analogous point exists in evidence in cases of insanity. It is an ascertained fact that insanity is hereditary. Yet, in our courts, criminal and civil, in both countries such evidence is excluded. Where the tendency now is to admit to the very utmost all degrees of light, it is not easy to perceive why the likeness of the child to its supposed father and the hereditary mental taint should not be admitted in both instances, merely as elements in the body of evidence.

In order to bring these observations to the test of fact, I have made out a table of cases of affiliation brought in the Court in which I have for nearly half a century acted as resident sheriff. This table extends from the year 1860 to 1872, and shews the number of claims brought each year, the number undefended, and on which decrees in absence or in default proceeded, the number opposed, and the result in decrees either condemnatory or absolvitory.

Year.	Actions brought.		Decrees in Absence.	Litigated cases.				
				Decrees agst. Defender.	Defender Assolvit.			
1860	...	60	...	25	...	27	...	8
1861	...	59	...	29	...	25	...	5
1862	..	64	...	34	...	28	...	2
1863	...	55	...	35	...	15	...	5
1864	...	50	...	30	...	16	...	4
1865	...	45	...	24	...	17	...	4
1866	...	62	...	38	...	17	...	7
1867	...	58	...	45	...	9	...	4
1868	...	52	...	27	...	20	...	5
1869	...	42	...	27	...	8	...	7
1870	...	69	...	45	...	18	...	6
1871	...	58	...	37	...	17	...	4
1872	...	61	...	44	...	12	...	5
		<hr/> 735		<hr/> 440		<hr/> 229		<hr/> 66

From this table it appears that during these twelve years there have been 735 claims made by mothers, of these 295, or nearly three-fourths, were opposed on denial of intercourse. Whilst the mother made good her claim in 229 instances, notwithstanding the defender's negative oath, the defender escaped in no fewer than 66 cases, notwithstanding the pursuer's affirmative oath. It follows that in 295 instances direct and gross perjury must necessarily have been perpetrated on one side or other, but far the greater proportion being by the defender. An illustration of the increasing amount of this burden is shewn in the last Report (1873) of the Board of Supervision for Scotland. In a northern district, where the registered poor were in round numbers 10,000, in 1872 and 1873, there were of that number, in the first named year, 176 women and 292 illegitimate children, and in the second year the number had increased to 187 women with 306 illegitimate children. (Appendix A, p. 2). From this it appears that several of the women had more than one child. Indeed, by a curious rule adopted in some parishes, relief is refused to the mother of a unit, but if she qualifies herself by a multiple, relief is readily granted. I also find a most variable practice in the length of time for which relief is given. Some parishes only afford relief for nine months or a year whilst the child is nursing. Others extend it to one, two, and more years. In further illustration of the increase of bastardy and the heavy burdens imposed on the poor law funds, greatly owing to the faulty mode of procedure in cases of affiliation, I have obtained statistics from some of the principal centres of population in Scotland.

1. In the half-year ending 1st February, 1874, there were admitted in the Glasgow, (City) Poor House 155 mothers with 185 illegitimate children.
2. In the Glasgow Barony, in November, 1874, there were on the Relief List 55 mothers with 168 bastards.
3. In the Govan (Glasgow) combination, at same date there were receiving relief, 56 mothers with 102 illegitimate children.
4. In Dundee, on 9th November, there were in the Pools

Houses 38 mothers with 76 illegitimate children. 5. In Aberdeen, on same date, there were in the Poors House 9 mothers with 18 illegitimate children, and seven mothers with 20 children receiving out-door relief. As a general rule Poor Law Boards order the mothers and children to the Poor House, and refuse out-door relief, consequently many children are thrown on public charity by begging. As costs are uniformly awarded on both sides, the successful defenders would have a heavy claim against the unfortunate mothers, but which is seldom possible to make good, though occasionally she is unpursued for payment of costs. On the other hand, in the 229 cases where the mothers were successful, the expenses awarded them would be very heavy in addition to those incurred to the agents for the defence. This in most cases renders the decree quite inoperative, and hence the children are placed as burdens on the public funds. By these statistics it will be noticed that the mothers have more than one child. The cost of a mother and one child in the Poor House is estimated at £10.

It is matter of consideration whether some form of process similar to the ancient *semi plena* of Scotland, with the mother's oath in supplement, might not be found a better mode of obtaining justice in this increasing class of cases. It has been suggested that a mode, not unknown in continental countries, might be still more efficacious in reaching the truth. First of all the parties should be separately interrogated by the judge in presence of the agents, but not on oath, and then if necessary confronted with each other. Such sifting of facts might in most of these delicate cases render farther evidence unnecessary, or where such is necessary would greatly limit its extent by confirming it to ascertaining which party has spoken the truth, and is in the right.

V.—FINAL REPORT ON PUBLIC PROSECUTORS.

THE liberty of the subject is the illogical proposition with which every statesman is met by those to whom a proposed innovation may promise to prove distasteful. It is, therefore, not surprising that the same argument is with equal inconsistency urged against him who would abolish the alleged right of the private prosecutor, a right founded on principles peculiarly unconstitutional. The true character of crime is one altogether of a public nature, the offence being not so much against the individual as against the State. When, therefore, the individual has done his duty in giving information, he has at least satisfied that which is required of him by society. His further proceedings are seldom actuated by merely a laudable desire for the well being of the State, but by a thirst for vengeance, and for the punishment of the accused as his wrong-doer, rather than the bringing to justice of one who has committed a breach of the laws of his country. It is consequently requisite to be reminded, when discussing the subject of a proposed system of public prosecution, that in all cases the Queen, as the representative of the State, is the *only* prosecutor.

In 1855, nearly twenty years since, we find Mr. Phillimore introducing his first Bill, dealing with a scheme of public prosecution, while the public sentiment as regarded it was as careless as now. The subject had then been permitted to rest quietly since 1845, when the Criminal Law Commissioners presented their Eighth Report, which, concluding with a very strong expression of opinion in favour of the appointment of a public prosecutor, attracted no small degree of attention at the time, both in the House and in the newspapers of the day.

Lord Denman, writing then in answer to a circular issued by the Commissioners, said, "our procedure for the purpose

of preliminary inquiry is open to great objection. The injured party may be helpless, ignorant, interested, corrupt. He is altogether irresponsible; yet his dealing with the criminal may effectually defeat justice. On general principles, it would evidently be desirable to appoint a public prosecutor, and I have little doubt such an officer might be invested with the necessary powers in such a manner as would be free from all reasonable objection; while it promoted the public interest by insuring the discovery of truth."

We have now before us, thirty years after the Criminal Law Commissioners issued their Report with the above commendation, the fifth and final Report of the Judicature Commissioners on Public Prosecutors. All the Commissioners agree in their Report (with the exception of the Lord Chief Justice Cockburn), so far as it does not refer to the redistribution of Circuits, a collateral enquiry they seem to have entertained. It is a matter of observation, in no little degree instructive, that the Lord Chief Justice's remarks are not dissimilar to those with which he, when Attorney-General, received Mr. Phillimore's Bill, 1856, and promised that, if the Bill was then withdrawn, the Government would take the matter into their immediate consideration.

In 1874, Sir Alexander Cockburn, as Lord Chief Justice, writes in his memorandum to the Report of the Judicature Commissioners:—"I have a high opinion of the police in general, but my experience satisfies me that their zeal sometimes leads them too far, and that the getting up of prosecutions should not be left to them after the first stage of the proceedings—certainly not without proper control." In another place he goes on to say:—"At present where a crime has been committed, the detection of the offender is for the most part left to the police, who generally take the matter into their own hands. The result is by no means always satisfactory. Sometimes, led on by an indiscreet zeal, they arrest or cause to be kept in imprisonment, persons against whom there is no proof, and who are afterwards

discharged, or against whom on their being brought to trial the proof breaks down. On the other hand, it sometimes happens—more especially in rural districts—that the police, from want of skill or intelligence, prove inefficient in tracing and apprehending persons who have committed crime. To make the system of public prosecutions complete, every case should at the earliest moment be brought to the knowledge, and be subject to the direction and control, of the public officer of the district, and it should be competent to him to intervene at any stage, though in the great majority of instances he might deem it unnecessary to do so earlier than for the purposes of the trial.”

That the present system of detection is inadequate, owing to the want of intelligent men able to sift the value and weight of evidence, so as to direct the police as to the trustworthy clue, and reliable track, was roughly demonstrated in the case of Dr. Hessel, in the spring of last year. It cannot be doubted that were such an officer as a public prosecutor present at inquests to examine witnesses, with a view of directing the efforts of the police, much fruitless search might be avoided, and a zealous body of public servants, such as our Metropolitan Police, be saved from the stigma which frequent failures of detection cannot fail to bring upon it. It may, perhaps, not be altogether forgotten that the learned stipendiary magistrate of Wolverhampton, Mr. Davis, was, after the scandal caused by Dr. Hessel's case, appointed as legal adviser to the metropolitan police, at Scotland Yard, an appointment previously advocated in the columns of this magazine. The present holder, however, has been hitherto conspicuous by his absence from any interference in the police prosecutions, a modest reticence we neither anticipated nor appreciate. We are somewhat ignorant of what his duties can consist, equally uninformed are we of what he has done, is doing, or is about to do. We do not forget that Scotland Yard took to itself considerable *modus* at the time, for the experiment, and the public were led to understand that such powers would be entrusted to the legal adviser as to obviate

the necessity of a public prosecutor for the metropolitan district, where alone, it was said, such an institution was either desirable or practicable. We have, therefore, watched with some anxiety for an indication of less misdirected zeal on behalf of that body. The public knows too well how our hopes have been answered. Had the powers of a public prosecutor, such as ought to form an essential part of those of the legal advisers, the right to investigate the merits of a case and the value of the testimony before its being brought before the magistrate, been entrusted to him, the administration of public justice and the character of the metropolitan police force would not have been blemished by so painful an investigation as that terminating in the conviction for perjury of police-serjeant Brennan. Blinded, as no doubt many a constable is, by the preconceived idea that the accused must be the offender, and by the conception inseparable from the cloth, that their duty is to convict, it is more than possible that, had he been guided at the outset by an intelligent mind capable of valuing the testimony in support of his theory, and free from the bias which a man obtains by intercourse with the witnesses, Brennan would never have had the opportunity or the inclination to commit such a crime. The heinousness of the crime of perjury, especially when the offence is aggravated by the fact that it is committed by a person on whose word the public and the magistrates are bound to place reliance, can find no excuse or palliation. At the same time we have little sympathy with an abused military discipline which proves generative, and fruitful of such opportunities. It cannot be too well known that the discipline of Scotland Yard does not admit of a mistake. If, on the one hand, a constable, from a knowledge of the magistrate's peculiarity, so frames his answer as to give it a colouring to fall in with the magistrate's mind, or, on the other hand, from want of experience, is confused by the magistrate's vehement cross-examination, he dare not retract. If he has mistaken the meaning of a question, he must not recall his words. If his conclusion of the prisoner's guilt has

proved unfounded or rash, he must not admit it. If, lastly, a link in the chain of evidence is required he feels forced to supply it. For no mistake must he make, or instant report to the Commissioners at Scotland Yard will follow, and he will undergo a court martial before military men who brook no excuse.

The scheme of the Commissioners is shortly, 1st, that there should be a chief public prosecutor with an adequate staff in London, and the means of obtaining legal advice. No suggestion whatever is made that he shall be a barrister or solicitor, or that he should have had any special training for his office. Although he is not to change with the Ministry, he is to be liable to be dismissed at pleasure by the Secretary of State for the Home Department. We much fear that unless he is to hold the appointment during good behaviour, no suitable person of attainments will be induced to accept the office. The insinuation that he should have to seek legal advice is ominous in the last degree. No one but an experienced legal man can be capable of satisfactorily fulfilling the duties which will be incumbent on the office.

and. That the Public Prosecutors in the Metropolitan district should be attached to the office of the Chief Public Prosecutor, and their services available in the district.

3rd. That the rest of England and Wales be divided into districts, in each of which there should be a sufficient number of resident or Local Public Prosecutors, subordinate and under the control of the Chief Public Prosecutor.

Between these local public prosecutors there is to be a class called Local Head Public Prosecutors to whom the former may apply for advice. In places where the population is not dense the Commissioners consider it would be advisable to make each district conterminal with the petty sessional division, within which one local public prosecutor would be sufficient. They proceed to recommend, that the local public prosecutor in country districts should be the clerk to the justices, and that he should be at liberty to hold other civil situations and to practice in civil matters. The remuneration of these officers is to be made by salary, not in fees.

Local Public Prosecutors are not to take up the prosecution until after the committal by the magistrates, unless otherwise directed by the Chief Public Prosecutor. The Report proceeds thus: "it should be the duty of the magistrate and of the police in any district to call the attention of the chief public prosecutors or his substitute to any case which in his opinion may be fit to be so taken up," *i.e.* to take the case up at any stage. We are here at a loss to understand whose opinion is referred to. If "the Chief Public Prosecutor or his substitute," then how is he to form an "opinion" until his attention has been called to the case? and if "the magistrate" and "the police" are referred to, we scarcely know which to object to most strongly, the grammatical construction of the clause, or its substance, making the magistrate and the police the machinery by which the law is to be placed in motion. "It is, as it strikes me," says the Lord Chief Justice, "scarcely consistent with the proper administration of justice in criminal cases, that the police, whose proper functions are to prevent and detect crime, and to apprehend offenders, should be entrusted with the duty of getting up prosecutions;" far less consistent is it for the magistrate, to whom the accused has to look for an impartial hearing, to have the responsibility of having in any manner originated the prosecution.

It is at once apparent that, should the above recommendations be carried out in the Bill of next Session, but little alteration would be effected in the present conduct of cases. As no provision is made in the scheme for instructing counsel at the Sessions other than at present exist, the evils consequent on the prosecution, emanating from the clerks to local justices, would not be lessened by the delay, while communications are being made to the head office. No system can answer in this country which shall not place in the hands of well-qualified responsible gentlemen—barristers or attorneys—the charge of certain defined districts. As the whole of their time should be devoted to the office it would be impracticable for them to be the clerks of petty sessional

divisions. As far fewer gentlemen would have to be employed, the expense need not be greater. This position is taken by the Lord Chief Justice, who concurs in recommending the divisions of the country into districts, but entirely dissents from their proposed formation. In his opinion the area of the country under the charge of the chief public prosecutor should be composed of certain definite districts, each presided over by a public prosecutor, who should be a barrister or solicitor of standing, and required to devote the whole of his time to the office. With him the police, as soon as a crime is known to have been committed, or person suspected of crime apprehended, are to communicate, and the magistrates' clerks are to be required to forward him a copy of the depositions, on committal of the accused by the magistrate.

It is on the portion of the proposed Public Prosecutors' scheme that more immediately affects the police in the conduct of the case prior to its coming into court, that we consider the Report the most weak and undecided. The Lord Chief Justice, as usual, shows his superior appreciation of the requirements not only of the police in bringing the offender to justice, but also for the protection of the subject. Still the Commissioners in the early part of their report admit "there are cases in which it is desirable to have on the spot the intervention of a person of superior skill and intelligence at the beginning, to test the accuracy of the conclusions drawn by the police from circumstances, suggest further inquiries, and, in short, conduct himself as an intelligent attorney charged with the getting up a civil cause for trial usually does. To be effectual, however, *the intervention should be early, for many of the little circumstances which are of importance in fixing suspicion on the right person are soon forgotten or lost sight of.*" The italics are ours, but the words are those of the Report. The subsequent recommendation in the portion of the Report dealing with the details of the proposed scheme, however, is, that "the general direction to all local public prosecutors should be to take up the

prosecution of all cases (not falling within the class which shall be defined as those which shall not be taken up without special directions) on the committal by the magistrate, or on the finding of a grand jury without any directions; and to report to the chief public prosecutor any cases in which there has been a committal for a crime falling within that class, and to take it up, or not, according to the directions he may receive. It ought, however, to be within their functions, and part of their duty, to give advice to the police of their district, when applied to at all stages of any prosecutions." This is to us the worst feature of the Report, and shows that, notwithstanding the apparent promise of better things to come in their opening, the majority of the Commissioners have failed to appreciate the anomalous state of criminal prosecution as well as its characteristics which distinguish the liabilities of the parties from those in a civil cause. This is, perhaps, the only country where its institutions seem to say, that crime is greater against the individual than against the State. What we contend is that any system of public prosecution, which does not remove the supposed sole right of an individual to institute a prosecution, from him to the State, and that, without any reservation, will prove utterly futile, effete, and nugatory. It is a disgrace to a civilized country that crimes of the deepest dye, of the most disgusting nature, of debasing example, should be permitted from the dilatoriness, meanness, inability, dislike of publicity, or what not of him who is now the prosecutor, to remain uninvestigated and unpunished. On the one hand the private prosecutor may not have the wish to have the case investigated, for reasons best known to himself, and, on the other, it is eminently unfair and unjust, to require him to place himself in the position of a common informer, and to request him to undertake the enormous expense, and incalculable loss of time, that the conduct of a criminal case, through its preliminary enquiries to its final verdict entails.

Let us take a case where, through the instrumentality of our Detective Force, (apparently kept for the purpose), we

have induced the unwilling aggrieved party to undertake the prosecution, to give the offender into custody, to instruct an attorney to conduct the proceedings at the Police Court or Petty Sessions, and to aid the police in their enquiries, so that the magistrate commits the case, with proofs clear and decisive of the offender's guilt to trial at the Sessions. How well would the country be repaid for the expenditure of public time, when the prosecutor finds it to be worth his while, as is not infrequently the case, to forfeit his recognizance rather than undergo a second time the harass and worry he has experienced. Yet under the new scheme, this will be left much the same as now. And after the State has been put to the expense of getting up the case, and of preparing proofs, no guarantee is provided that the prosecutor shall not thwart the ends of justice by refusing to prosecute.

FRANK SAFFORD.

VI.—THE LAWS THAT REGULATE LONDON.

By Mr. SERJEANT PULLING.

LORD COKE remarked, two hundred and sixty years ago, that to treat of the laws and customs of London would require a whole volume of itself. At this day it is difficult to count the volumes in which are contained the various laws and regulations specially affecting London. It would certainly be an endless task to enumerate the varying, and often conflicting, provisions by which the London of our time is governed. Parcelled out under twenty different systems for the professed purposes of local government, into districts of all shapes and sizes, as the occasion of the hour suggested, London has for each separate object a different set of districts, divisions, and subdivisions. A Map of London,

with the existing boundaries accurately marked, would present a very fantastic appearance, and it would certainly tax the ingenuity of the draftsman. With all the colours of the rainbow on his palette, to find distinctive shades for the ever varying areas, the Map would of course show the boundary of the eight cities and boroughs, now constituting the Metropolis, with their several wards and subdivisions, and the 200 parochial and extra parochial districts of which these are composed. Then, beginning a-fresh with the several county boundaries, the area of jurisdiction of the Central Criminal Courts of the London, Westminster, and Clerkenwell Sessions, and the fifteen police courts, the thirteen county courts, and finding a satisfactory colour for the boundary, designed to distinguish trials in London from trials in Middlesex, the draftsman would have to delineate on the map thus scored over, the territories of the Metropolitan Board of Works, of the thirty-nine local boards, their wards and divisions, and of the thirty-nine Boards of Guardians. He then would have to carefully mark out and find distinct colouring for the nineteen police divisions, the fifty-six building Act districts, the thirty-seven registration districts, the ten School Board districts, the fifteen lieutenantancy and militia districts, and (more difficult of all to delineate) the dividing of the metropolis for ecclesiastical and eleemosynary purposes. Such a map, with proper shading to denote the rate of local taxation, would be of very great service, not only to all persons taking a part in London local government, but to members of the legal profession, and indeed to every Londoner

The City of London, in Lord Coke's time, housed within its confined area of about one square mile not only the whole of the citizens, but for the most part the population of London; and for the government and well being of the City so peopled there existed laws, franchises, customs, and privileges derived from very ancient times, when London, like all the free Cities of the Middle Ages, existed to a great extent independently of any superior power. The ancient laws and

customs of the City of London, which again and again are referred to in Coke's works, were designed to supersede almost all external control; regulating not only the local government of the City in the most comprehensive sense of the term—its police, sanitary system, supply of water, light, and fuel, its roads and buildings, poor relief and suppression of vagrancy, technical education, regulation of the markets and exchanges, the shipping and port, the guilds and trade, regulating apprenticeship, and the relations between the workmen and their employers, the guardianship of orphans, and certainly a great many matters which, at this day, are deemed to be altogether beyond the scope of mere municipal regulations.

During the two centuries and a half which have elapsed since Coke wrote both London itself, within and without the old walls, and the regulations coming under the designation of the laws of London, have wonderfully changed, and the latter certainly increased in bulk and number, as well as in character and diversity. In defiance of royal proclamations prohibiting the erection of *any building upon a new foundation within the limits of three miles from any of the gates of the City of London or Palace of Westminster*, and other sagacious provisions, extramural London has gradually expanded to its present dimensions, and the single square mile, which constituted the site of ancient intramural London, has come to be disused as a place of residence, and to form a small part of the actual London of our day, a part which, abandoned for residential purposes, is now merely used as a place of resort during a portion of the day for the mercantile classes, whose permanent abodes are spread over the whole area of the metropolis.

London, properly so-called, now comprises an area of about 78,000 acres, or the ancient area more than one hundred times magnified, and its growth and prosperity have certainly not been helped by any system of legislative provisions. Until 1855 there was really nothing approximating to a system of local government for the metropolis.

As district after district sprung up, its local government was left for the most part to be provided for by the makeshift machinery improvised from time to time by mere local schemes. The machinery of the parochial vestries originally called into existence merely for the purposes of the management of the Church and the relief of the poor, was, from time to time, altered, patched up, repaired, and extended, so as to pass as a substitute for actual municipal government, and whilst comprehensive measures for sanitary purposes were, to a great extent neglected, the supply of water and light was left to the mercy of mere private companies, avowedly seeking, at the hands of the legislature, sanction for taxing the inhabitants to the largest practicable extent for the supply of the necessities of life.

The Corporation of the old City of London inevitably composed, under the circumstances already described, of materials altogether inferior to those which belonged to it when the City formed really the whole of the metropolis, little interfered in all this. Year after year they opposed every measure of reform likely to affect them. They neglected the River, and the Port, and resisted the formation of Docks, abandoning the latter work to the mercy of private companies, and being at last relieved by law from the conservancy of the River. There have no doubt been at all times energetic men in power at the Guildhall, but it is nevertheless true that whilst every other municipal corporation in the Kingdom was reformed forty years ago and the municipal limits extended so as to embrace the whole area of the ancient city or town, we owe to the successful resistance of the Guildhall, to all efficacious and comprehensive reforms in the Local Government of London, its present anomalous state.

A recent movement, emanating in the first instance with a merely private Association, revived the interest felt in the question of London Municipal Reform, and the interest has been kept alive by an admirable paper by Mr. Hare, read at the Law Amendment Society, and a discussion on the subject •

which has been spread over several evenings. In the course of three recent discussions on the subject, whilst we have heard on the one hand strong expressions of general dissatisfaction with the state of things at present prevailing, and the most singular objections on the part of those who having officially or otherwise personal interests in its continuance, it has been well made out that the almost unanimous cry is for uniformity and efficiency in the local government of London, and what would inevitably follow, greater economy and less local burdens.

To the legal profession the subject of London local government may appear at first sight of secondary importance, but on reflection it will be seen that no class are so competent to testify to the evils of our present want of system, the unnecessary trouble which the conflicting provisions of the local enactments occasion, the inconvenience and cost which arise from the confusion of districts, and the *impracticability*, to say the very least of it, of the one thousand and one separate officials whose humours have to be studied and conciliated.

VII.—MODERN PRACTICES OF THE BAR.

WE observed with great gratification that a very common and reprehensible practice had been spoken of by a member of the Bench in a manner in which it deserves. When we say that the member of the bench who uttered the criticism was Mr. Commissioner Kerr, we need not infer that the criticism to which we allude was complimentary neither to the custom itself nor to those who practice it, as Mr. Commissioner Kerr is only famous for

uncomplimentary criticisms. We do not for one moment say that Mr. Commissioner Kerr is never complimentary, but only that his utterances, when of a contrary nature, attract the most attention.

The practice to which we allude is the well-known practice amongst barristers called "devilling," and we think that we cannot do better than repeat here at length the description recently given in the *Times* of what took place on the occasion to which we refer:—

"For upwards of an hour after the opening of the fourth court, at the Central Criminal Court, on Friday, although there were four cases for trial on the list, the business was at a standstill, owing to the absence in one of the three other courts which were sitting simultaneously, of one or more of the learned counsel, who were instructed either to prosecute or defend the prisoners. After waiting some time Mr. Commissioner Kerr observed that it might be thought degrading to take a leaf out of the book of Scotch law, but the High Court of Justiciary in Edinburgh sat every Monday throughout the year for the trial of criminal cases, and as there was consequently no accumulation or congestion of business, the court invariably got through its work early in the day. In London, however, there were but twelve sessions in the year, each of which, as a rule, with four courts sitting, occupied the greater part of a week. The result was that the same counsel were engaged in most of the cases, and that a number of separate juries had to be kept kicking their heels about day after day. Perhaps it might be as well in future for the counsel to arrange among themselves when the sessions should be held, and then to bring down the judges and juries after they had completely made up their minds on the point. He thought the disreputable practice of counsel who were instructed in cases handing their briefs over to others who knew nothing of the facts should be discountenanced and stopped. Sir Cresswell Cresswell, an eminent counsel and judge, prided himself that in the whole course of his professional career he had never handed over any brief entrusted to him, and it would be well if Sir Cresswell's highminded and honourable conduct in that respect could be generally followed. The system at that Court, by which a few counsel monopolised the whole of the business, and then handed over their briefs to juniors if it was inconvenient for them personally to attend to them, was simply detestable. He should like to see every prisoner insist on being defended by the counsel whom he had in-

instructed and paid, and by no other, and he for one would listen to any application by prisoners to postpone their trials until their own counsel could attend. He believed if he had his own way in that court for three or four months, he should be able to put it in something like order. The learned judge, following up these observations, postponed until next sessions a case in which the defendant was out on bail, where his counsel was then engaged in another court and could not represent him. In another case a prisoner said his wife had instructed a barrister, whom he named, to defend him, but he now found that the same counsel was conducting the prosecution against him. Mr. Commissioner Kerr said there must be some mistake, for, bad as things undoubtedly were, he could not believe that the same counsel would undertake to defend and prosecute the same man. It was then explained that the learned counsel in question, finding that he was instructed for the prosecution, at once returned a brief for the defence which was placed in his hands. The prisoner enquired if the money which his wife had paid was lost to him. Mr. Commissioner Kerr said he hoped not, but it all depended upon certain professional rules of etiquette, into which he could not then enter. A barrister present said it depended, in addition, upon the common honesty of the counsel. Mr. Commissioner Kerr remarked that that was a long since exploded doctrine, for the fee given to counsel was merely an *honorarium*. With that the business of the Court was proceeded with."

We can only say that the practice so forcibly condemned by the learned Commissioner is followed in so unjust, unseemly, and reckless a manner, and that this has become so notorious that it is now high time that something should be done either by the bench or the profession, or both, to check it.

We propose to remark on the practice of "devilling," *i.e.* of one counsel keeping their fees and handing over briefs to other counsel. The justification universally alleged in favour of this practice is that it is absolutely necessary, as no counsel can be aware of the period when a particular case will come on in a particular court, and cannot therefore be aware whether he will or will not be engaged in an adjoining court at the time. We quite admit the truth of this argument, and we ask no more under the circumstances than is quite practicable, *i.e.*, that when a case in which a barrister

is retained is called on at the time he is engaged on another, that he shall not be allowed to hand over the brief to a brother barrister, but that he shall be compelled to hand back brief and fee to his client, and that he shall be equally compelled to do this as soon as he has reasonable notice that he cannot personally attend to both. The well-known instance of Sir Cresswell Cresswell, alluded to by Mr. Commissioner Kerr, is a sufficient proof that this course is perfectly practicable, as very few men who practice the modern iniquity can boast of so large a practice as was his. We must, however, not forget that to carry out this rule so as to give the client the full benefit of it, counsel must be prepared to act up to the true spirit of the rule, and not seize upon every possible excuse for retaining a brief till the last moment. We quite admit that an unscrupulous counsel may so act as to render such a rule of small benefit to the client, but members of the English Bar are called upon to be and are supposed to be conscientious and right-minded men, and it is only on the supposition that the rules of the bar are to maintain such a standard that we now write.

But this matter may surely be looked at from a common-sense and every-day point of view—from the stand-point of common duty and common honesty between man and man. It is absurd to talk of the "etiquette" of the bar in a matter of this kind. The etiquette of the bar was never intended to cover or assist dishonesty and swindling. The duty of every man who undertakes any business in any of the daily walks of life is to take care that he can attend to it, and to give notice of the fact as soon as he sees an improbability of his being able to do so, and it is the duty of the person undertaking the business to find out this probability or improbability. How is it possible for a client to go over all the engagements of a member of the bar, and conclude whether he can attend to a particular case or not? It is impossible for a client to learn either the engagements of counsel or their nature. It is the duty of counsel to learn this, and to distinctly inform their clients of any improbability of their

being able to attend to the business intrusted or offered to them, and they should not be allowed to keep briefs unless they are certain of being able to attend to them. The client, moreover, should be informed of this in time to instruct any other counsel before the case comes on. This is nothing more than the rule of diligence, which is exacted in all the daily business transactions of life. If the counsel first engaged chooses to recommend any other barrister as a good man to conduct the case, this is a matter for him to consider solely, so far as regards his own personal dignity. Etiquette has, however, very properly dealt with this kind of conduct in the past, and though the rule is now much disregarded, yet it was considered, at one time, as against the rule of professional good manners for one counsel to recommend another. This, however, is not a matter of right and principle, but is one of pure and simple etiquette or good manners.

There is, however, amongst the privileges of the bar one privilege which forms a very strong reason why counsel should personally attend to every case in which they accept retainers, and that is that injured clients have no right of action against their counsel, however negligent and careless they may have been. This immunity on the part of counsel should make them more, and not less, circumspect, lest their clients should suffer any loss or injury.

It may be asked what is the remedy for this state of things. To suggest the remedy is easier than to effect it. The real remedy is the adoption and cultivation of a high and honourable spirit amongst the bar. We are glad to see that Mr. Commissioner Kerr has promised to do his best to defeat the practice. The remedy promised, however, can only partially meet the evil, unless he can persuade all other judges to do the same. The only effect of the learned Commissioner's threat will be that counsel will do what they can to keep their defended cases out of his court, and if they cannot do this then they will attend to those which are in his court to the neglect of those in other courts.

The public, however, and their solicitors are to some extent to blame. They do not trouble themselves to discover counsel who are both disengaged and competent. There are plenty of this class to be secured. Both the public and solicitors rush to persons with wide reputations, more frequently whose only recommendation is that their name is often heard, who manage the newspapers, and who often rather play before and to the public, instead of advocating their client's case. It very frequently happens that one of these gentlemen is retained in many defences at country quarter sessions. There are two courts: Mr. — is stated to be defending in the next court when another case in which he defends is called on. The Court refuse to compel counsel to hand over defences. Why? we ask. Are there not upon all the sessions in England more men than one who are competent to defend a prisoner? We venture to think that there are plenty of counsel who are able to defend a prisoner well, although there are very few who have that facility of presence and faculty of persuasion that they can secure an acquittal against the strongest odds. This is no right of any man. Let the Court insist on every case coming on in its order, no matter who prosecutes or who defends, and let prisoners insist on having either their money back or the services for which they have paid, and the monopoly at present maintained by unscrupulous and weak-minded counsel would at once disappear.

• We are much pleased to see our learned contemporary, *The Law Times*, pointing out the exact position of this question.

“It is hardly credible that in court business junior barristers should lend themselves to support a monopoly which is a sure barrier to their own legitimate progress. It becomes the more astounding when the result proves that the public will, if possible, employ the monopolists notwithstanding repeated disappointments. Without the assistance of the briefless barristers the monopoly would come to an end, and the briefless would become practising barristers. These gentlemen prefer, however, to work for nothing on the bare speculation that they may captivate the attorney or the

public, and they persist in it in spite of the evidences of all their senses that it is to a large extent if not entirely vain. So long as the briefless barrister consents to "devil," so long will the monopoly flourish to the detriment of the public and the Bar, unless the Judges take cognizance of it and not only denounce it, but place difficulties in the path which shall render its continuance practically impossible."

We strongly recommend the above remarks to the junior members of the bar. We would appeal to them to resist the temptation of making an appearance of doing business, by earning a living for other men who are, in nine cases out of ten, both unable and unwilling to help them.

Our remarks upon this subject are, on this occasion, very short. Very much might be written on the matter, and we hope, at some future and early date, to treat of the cause and cure of this professional misfortune.

BOOK REVIEWS.

LAW AS A SCIENCE AND AS AN ART: an Introductory Lecture delivered at University College at the commencement of the Session 1874-5, by Sheldon Amos, M.A., &c., &c.. (London: Stevens and Sons. 1874.)—What has chiefly struck us hitherto in Professor Amos's writings is the presence of a good deal of talk about science and the total absence of the scientific spirit. Professor Amos has probably felt this himself, and seems to have composed the present lecture with the view of shewing that he does really know what science is. Let us examine his definitions: "If a number of rules have to be understood, and perhaps committed to memory, for the use of immediate action, the branch of knowledge with which these rules are conversant appears in the character of, and is likely to be styled, an *Art*. If, on the other hand, the branch of knowledge is being tracked to its origin, either in the necessities of the human mind, or in the sequence of outward nature, and a sort of mental pause is interposed between the moment of contemplation and that of turning the acquisitions to practical account, then is the branch of knowledge recognised as, and named, a *Science* rather than an art." One essential quality of a definition is that it must employ terms which are either unambiguous or have been already defined. Now, in the above definition of "science" the phrase "branch of knowledge is being tracked to its origin," is most ambiguous, for it may either mean that the ultimate cause of the phenomena is being investigated, or that we are relating the history of the investiga-

tions themselves. If Professor Amos means that science consists in the discovery of the ultimate cause of a given class of phenomena, we can only say that we do not agree with him, for that is the business of philosophy. The accepted definition of science as a collection of generalizations existing more or less separated, i.e., without the ultimate connecting link supplied by philosophy,* seems to us more exact and more satisfactory than the one given by Prof. Amos. If we wished to bring out the side of scientific investigation which is practically the most important, we should say that science consisted of generalizations based on accurate data. No one who has read any of Professor Amos's writings can wonder that this point has escaped his attention. It is true that whenever he wishes to throw dust in our eyes to hide the weak points of one of his pet theories he calls the subject matter of investigation a "fact," but for facts in the scientific sense he has a supreme contempt. We pointed out, in reviewing his "Science of Law,"† the extraordinary inaccuracies in matters of detail occurring in every chapter. This alone is enough to make us cautious in accepting any dicta on the question of science from his mouth. When Professor Amos is not brought face to face with obdurate facts he is more in his element. His remarks on the different modes of observation in the moral and physical sciences, and on the relation of law to sociology, are fair and judicious. It is probably useless to protest against law being called a "full-orbed science," and "a great force generated, at the first, by the joint operation of physical needs, social impulses, and moral claims." Professor Amos cannot help using strong language, but it would be convenient to have a glossary of his scientific oaths, so that we might know when to neglect them.

EARLY ENGLISH HISTORY, by JOHN PYM YEATMAN, of Lincoln's Inn, Barrister-at-Law. (London: Stevens and Sons. 1874.)—Mr. Yeatman writes with all the spirit of a true antiquary. He has an ardent appreciation of his subject, and pursues it with a keenness and zest known only to those who have for some time indulged in antiquarian research. Perhaps there is no study so repulsive at first or so fascinating after a time. Indeed, it is useless to argue with an antiquary possessed of a theory. As he sees beauties in matters that to the common herd of mankind

Herbert Spencer's "First Principles," 182.

† *Law Magazine* for August, 1874.

appear vulgar and unattractive, so does he find latent analogies and germs of laws and codes in what a less learned person would regard as a mere chapter of accidents. This is fortunate for antiquity. As a biographer is unfit for his work, unless he regards his hero as one of no common endowments, so the student of antiquity would lack the energy necessary to extract the precious nuggets from the ancient quartz, unless he expected to find a treasure at each blow of the hammer. Mr. Yeatman's work accordingly turns up much fertile soil, and, though we do not concur in his main views, yet we willingly recognise the general value of his treatise.

Its main object seems to be to unearth those jural elements that lie deep at the bases of our laws and to assign them, if possible, a British rather than a Saxon origin. In this aim he is undoubtedly nearer the truth than those writers, and they are legion—including even the great Blackstone himself—who ascribe a Saxon origin to our common law. That law, however, is wholly Norman and British, the Saxon elements only making their appearance as special customs here and there—*rari natantes*—in Kent and a few other places. Now the essence of Common Law is general custom, and opposed to local usage, and the general customs of England are all of Celtic growth. Mr. Yeatman, however, we think, attributes too little influence to the Norman element. Yet it was to Norman jurists rather than to British remains that our Common Law owed its rise. This is an important point; for, though the Normans were of Celtic stock, in the main, notwithstanding their invasion by Teutons, and were thus of the same blood as the ancient Britons, yet the Norman Jurisprudence was Roman, while the British of course was of the archaic type common to all tribes that do not enjoy extensive foreign conquests or trade. That Bracton was familiar with the works of Justinian is clear from his interpolation of whole sentences verbatim from the consolidations of the Roman codifier, although the discovery of the MSS. at Amalphi was subsequent to his time. The usages commonly attributed to the Saxons, such as trial by jury, are really due to the Romans, who in the third era of their civil process, that of the *extra-ordinaria Judicia* Law had the respective provinces of judge and jury clearly distinguished. Mr. Yeatman, then, is right in the negative side of his position—that our Common Law is not of Saxon origin. But there is more reason to object to his positive theory, that our jurisprudence is largely indebted to British customs.

However, Mr. Yeatman has, from the copious citations of

authorities referred to in his book, shown that his opinion on this point is not to be lightly contemned. He "found so much in our law which clearly could not be referred to the Romans, but which was obviously of much older date than the period of their occupation, that he looked farther into the matter, and satisfied himself that to British institutions alone are the bulk of our laws to be attributed." This is the leading position of his book. He considers that our Common Law is indigenous, and that the traces of Roman learning in the works of Bracton and Fleta only indicate that the Norman lawyers engrafted foreign rules on an indigenous stock. This is possible; but he does not give a sufficiently copious induction of instances to prove that the bulk of our ancient *corpus juris* was British and not Norman.

It seems that prior to the code of Homell Dda or Homell the Good, the Common Law of Britain was literally unwritten, and "reposed in the breasts of her sages," just as many a secret now slumbers on the bench, which can only be evoked at the peril of an inquisitive litigant. However, it is certainly curious to learn how, as Mr. Yeatman describes (p. 27), Homell's jury of twelve from each cantrene "were summoned to declare and enunciate the law as it existed," (the very precedent followed by William the Conqueror, when he undertook to ascertain and govern by the Common Law).

- On another endeavour to show that the nationality of England is Celtic or British, and not Saxon, the extension of the Saxon tongue to all ranks is, indeed, no evidence that there was a total merger of the preceding weaker element in the Saxon "remainder;" nor is it unlikely that a larger proportion of the English race is Celtic either through the old British or the more recent Northern element. But it is unlikely that the Angles were Celts, or of a different genus from that of the Saxons, although Mr. Yeatman can quote authority for this view. His description of the influence of Roman jurisprudence on modern laws indicates much literary grace and skill. "The influence," he observes, "of Roman institutions, of Roman thought, and Roman language, still remain. Rome did not die. She still lives; and we feel her influence in every act of our lives. Her wondrous powers, which had a divine origin, were reinvigorated by the sublime principles of Christianity, to which she was directly allied by her later emperors. What a contrast between the influence of Rome and the barbaric influence of the Saxons! Whilst dominant here, they did unfortunately more to upheave and overthrow the very status of social life. They destroyed life and property, instead of conserving it. They brutalised the

morals which Roman degeneracy had vitiated. They darkened the intellect, and destroyed the literature which Rome had spared and embellished. And when they departed--when the sword of the fiercer and nobler Dane well-nigh exterminated their race--they left nothing but a terrible shadow behind them, a hideous memory, which, though it cannot instruct, may still appal--the spectacle of a superior intellect degraded by brutal vice--the vision of a fallen race."

Our author appears to be quite at home with the laws of Athelstan, the Saxon Chronicle, William of Malmesbury and the whole series of Common Law records, which, as he very properly suggests, ought to be indexed at once. No one certainly could be fitter for directing such a project than Mr. Yeatman. His book shows an ardent love for ancient research, and though we consider that he attaches too much value to everything British, yet, considering how few writers draw off their attention from the more popular Saxon, we are not sorry that Mr. Yeatman has had this bias. It is only a zealous advocate that can show the Briton in his true character besides the more successful Saxon.

From the few extracts we have given, it is clear that Mr. Yeatman is a rhetorician and a poet of no mean order. If even he divests his thoughts from the Common Law, a boundless and more fertile field will lie before him in the domain of general literature. Critical investigation must be carried on in a very calm fashion, and the philosophic historian is presumed to be as calm, if not as inanimate, as the mummies he is dealing with. Mr. Yeatman has too keen an appreciation of what he regards as the truth to exhibit the orthodox indifferentism, which is now a characteristic of the learned. On the other hand, without the "aflatus," no interest can be imparted to antiquarian research. Mr. Yeatman certainly has all the qualities that constitute a vigorous writer. A drawback to his work, however, is not that he has taken an unpopular side, but that he attaches too much importance to what may have been only accidental coincidences. It is to be remembered, however, that down to forty years ago locomotion by sea was not much more rapid than it was in the time of the ancient Britons. It is not very improbable, then, that these had their foreign correspondents, even in learned Greece. We are apt to consider that the Britons were *penitus tota orbe remoti*; yet they could in a few weeks have visited the classic lands of the East, and there have given and received literary gifts. There is not, then, anything improbable in most of Mr. Yeatman's views on these points. His work at all events indicates great facility of composition and an intimate familiarity with all the leading arcana of Celtic lore.

AMERICAN LAW REVIEW, October, 1874. (Boston: Little, Brown, & Co.) The *American Law Review*, for October, 1874, contains, as usual, an attractive collection of miscellaneous legal articles. The first relates to the highly interesting question of International Copyright, in connection with the leading cases of *Jefferys v. Boosey*, 4, H.L.C., 815; and *Routledge v. Stone*, L.R. 3; H.L.C. 100. It is a pity, certainly, that publication must be made within the United Kingdom, under the Act 5 & 6 Vict., even though the author be within the possessions of the Crown. Nor does it appear that there is any difference between the effect of 5 & 6 Vict. and the 8th Anne, as far as relates to the subject of the residence of foreign authors. The article in the *Review*, after considering the status of foreign writers in England, reviews the rights of alien authors in the United States. The writer has grappled with the salient points of these questions in an able manner, and concludes by warmly advocating an International Copyright Law—a work in which most authors in both hemispheres will heartily join. The trial of William E. Uddezork furnishes some melo-dramatic matter which agreeably diversifies the legal miscellany. "The Wisconsin Railroad Acts," and "the Law of Adoption" constitute topics that highly interest American citizens. Adoption appears to be a very general practice in the United States. Since 1851 a great number of States have legislated on the subject. The original matter in the *Review* is not very voluminous, but the quality of the articles is excellent, and not the less so that they are composed in a simple style, without much resort to rhetorical embellishments.

A MAGISTERIAL AND POLICE GUIDE, by HENRY C. GREENWOOD, Stipendiary Magistrate for the district of the Staffordshire Potteries, and TEMPLE C. MARTIN, of the Southwark Police Court. (London. Stevens and Haynes. 1874.) At the present moment, when considerable attention is being paid to summary procedure before magistrates, this "Magisterial and Police Guide" is specially welcome. In a handy and convenient alphabetical form, the learned editors have placed before the reader, not only the general law affecting Justices of the Peace, but the enactments which are in force in the metropolis alone. This, so far as we are aware, has never before been attempted. To those who do not possess convenient opportunities for referring to the statutes themselves, the accurate transcript of sections which has been adopted will be simply invaluable.

The work includes all the legislation affecting the subject of criminal law, passed during the last Session, while cases are

cited down to the date of publication, the 2nd November. We have, therefore, the latest notes on the recent Licensing Act, as well as the text itself. The entire plan of the work shows that its compilers are practical men, who have felt the difficulties of reference in such works as the last edition of Burns. The index is most unusually clear, and ample. All sections on procedure are collected together, in one chapter, which will be found a useful guide to that often-times puzzling matter. The chapter on "arrest" and "constructions," set out under the heading "constables," is comprehensive and clear, a not unimportant point in a book which professes to be a Police Guide. The marginal notes on each section show, at once, the Act to which reference has been given, while the editors have not contented themselves with referring each case to one set of reports, but give every report in which reference to the case is made. For example: *R. v. Hudson*—8 Cox, C.C. 305—6 Jur. N. S. 566; 2 L. T., N. S. 263; 29 L. J. M. C. 145; 24 J. P. 325.

Among some of the more notable subjects, great attention seems to be paid to Dangerous Goods, the many and difficult provisions of Factory Legislation, the Intoxicating Liquor Laws, Larceny, the law relating to Masters and Servants, the Metropolitan Police, and Hackney Carriage Acts.

It is difficult to give, in a short notice, any accurate idea of a work of nearly one thousand pages, especially so immediately upon its publication, but we trust at a future time to more closely analyze the "Magisterial and Police Guide," with a view to assist the editors in their desire to correct any inaccuracy or omission in future editions. The work has been very appropriately dedicated to Sir Thomas Henry. It has been clearly printed on good paper, and reflects great credit on the publishers. The moment for its appearance (no new edition of Stone or Oke's works having appeared) is most opportune, and we cannot but believe that the "Magisterial and Police Guide" will be found not only of great value to magistrates and the police, but to the legal profession, all local authorities, and legislators, as well as to that portion of the public who desire to study the laws of their country in an easily available and practical form.

6 THE REAL PROPERTY ACTS, 1874, WITH EXPLANATORY NOTES, by W. T. CHARLEY, D.C.L., M.P. (London: H. Sweet. 1874.)—This is a highly interesting collection of the Real Property Acts passed last Session. It would seem that the harvest of legislation is best reaped in calm weather, and not when a tempest of political debate is disturbing every thing around. Every person not an M.P.

must have regarded the last session as a sort of *casus omissus* or *dies non*, considering the very quiet way in which it passed by, compared with the turbid sessions of preceding years. Yet, judging by Mr. Charley's manual, the year has not been barren of results in the way of law reforms. These are noted by the author in a light, agreeable manner. Sometimes he comments upon a leading case with all the art of an accomplished lawyer, and anon he treats the reader to a fragment of Parliamentary debate. The book has thus some pretensions to be regarded as light reading, while it certainly is as useful as it is interesting.

The second Act in the collection is the Personation Statute passed in the interest of infant heirs who may be threatened with visitors from Australia. It seems strange that such an enactment has been deemed necessary. Granting that personation in order to obtain property ought to be deemed a serious offence, the previous state of the law would seem to have sufficiently provided for the result. The present Act, however, appears to have the peculiar advantage of "not expressly connecting the person personated with the ownership of, or right or title to, the property which the guilty person seeks fraudulently to obtain." Nor will it be material that the party personated is dead. However, if the maxim *ubi jus ibi remedium* had any real significance in our law, such enactments ought to be deemed unnecessary.

When Lord St. Leonards had the Illusory Appointments Act passed it was seen that a coping-stone was wanted to complete the structure. This has been added by the 37 & 38 Vict., c. 37, so that it is no longer necessary to give, at least, a memorial stone to every object of a power not exclusive in terms. The Real Property Limitation Act, which shortens the period for bringing ejectments on title from twenty to twelve years, is open to question, in respect to the prudence of the measure. It is true that a person beyond seas may now return in a few days. But the attractions of a foreign domicile are a greater impediment than wind and more to a speedy return. The pines of Canada cost more labour in the felling than in their carriage to England. So is it with the voluntary exile. However, the Act does not come into operation until 1879. The Vendors' and Purchasers' Act, c. 78, is founded on a similar principle. Section 5 may raise some doubts as to whether it does not apply to a joint tenant trustee dying. But the better opinion, we think, is that the section will be construed as applying only to sole trustees. Mr. Charley's brochure is a creditable performance, and is neatly prepared with a table of cases and index.

THE JURISDICTION AND PRACTICE OF THE SUPREME COURT OF JUDICATURE AND OF THE DIVISIONAL COURTS UNDER THE SUPREME COURT OF JUDICATURE ACT, WITH AN APPENDIX OF FORMS, RULES, AND REGULATIONS. By HERBERT AYCKBOURN, Solicitor. (London: Wilcox & Son. 1874.) This book was written, to use Mr. Ayckbourn's own words, to give "a concise and practical arrangement and exposition of the Act (Judicature Act, 1873), and of the rules and orders issued, in pursuance of it," and we may congratulate him on having executed his somewhat laborious task in a manner likely to be of use to the profession. The arrangement of a book of this description, in such a manner that the difficulties of reference are reduced to a minimum, is, of course, the first object to be attained, and whether this has been effected or not, is, of course, the test of its value. We do not purpose giving a sketch of the plan of the work, or of interpolating any remarks of our own. Our readers may judge for themselves what is likely to be its probable use as a book of reference. We do not discern any startling novelty in the method of compilation of the volume before us, but it does not suffer in our eyes on that account.

As the Judicature Act may be taken to consist of three parts, each distinct and yet belonging to one another, it is very convenient to have them dovetailed, as it were, each subject treated of under its different heading. This Mr. Ayckbourn has done. Thus are brought together the three parts of the Act we refer to in the body of the Act itself, the rules of procedure contained in the schedule, and other rules and regulations issued in pursuance of the Act. For the purpose of convenience the Rules of Procedure are referred to as rules, and the regulations as orders.

It would be useless for us to go through the whole of this volume, or, indeed, to do more than we have already done. The Act is taken section by section, and the rules and regulations are throughout arranged so that each section is appropriately explained. At the end of the book we find forms of proceedings, and also the rules of court set out in full, and we think Mr. Ayckbourn would have added to the value of his work if he had set out the rules of procedure contained in the Schedule of the Act in the same form.

BAR EXAMINATIONS.

Michaelmas Term, 1874.

At the general examination of students of the Inns of Court, held at Lincoln's Inn Hall on the 22nd, 23rd, and 24th ult., the Council of Legal Education awarded certificates of having satisfactorily passed a public examination to Mr. Yarborough Anderson, and Mr. James William Best, of the Inner Temple; Messrs. Henry Burton, Frederic James Cornish-Bowden, John William Gustave Leo Daugars, Stephen Herbert Gatty, George William Gillow, Allan Gilmour, and Francis Frederick Handley, of the Middle Temple; Mr. Daniel Robert Fearon, and Mr. Charles Albert Ianson, of Lincoln's Inn; Mr. William Izard, of the Inner Temple; Messrs. Yves Pierre Antoine Jollivett, Henry Kisch, and David Law, of the Middle Temple; Mr. Andrew Lyon, of Lincoln's Inn; Mr. Edward Marjoribanks and Mr. Herbert Percival, of the Inner Temple; Mr. Hugh Edward Pigott Platt, of Lincoln's Inn; Messrs. Walter Byron Prosser, Arthur George Rickards, Arthur William Roberts, and Ernest Frederick Silvester, of the Inner Temple; Mr. Richard Meares Sly, of the Middle Temple; Mr. Julian Russell Sturgis, of the Inner Temple; Mr. Herbert Travers Tamplin, of the Middle Temple; Mr. John Bayldon Walker, of the Inner Temple; Mr. Arthur Thomas Waring and Mr. Thomas Rolls Warrington, of Lincoln's Inn; Mr. William Wasteneys, of the Middle Temple; Mr. Charles Newman Watts and Mr. Charles Henry Woodruff, of Lincoln's Inn. At an examination of students of the Inns of Court, held at Lincoln's Inn Hall on the 26th and 27th ult., the Council of Legal Education awarded to Mr. Abbas Shumsodeen Tyabjee, of Lincoln's Inn, a certificate that he has satisfactorily passed an examination in Hindoo and Mahomedan Law and Laws in force in British India.

CALLS TO THE BAR.

Michaelmas Term, 1874

The following gentlemen have been called to the Bar:—

Lincoln's Inn.—Daniel Robert Fearon, Esq., M.A., Oxford; Douglas Close Richmond, Esq., M.A., Cambridge; Thomas Middleton Rogers, Esq., B.A., Oxford; John Baddeley Wood, Esq., B.A., Oxford; Henry Rae, Esq., B.A. and LL.B., Cambridge; Henry Edward Hirst, Esq., M.A. and B.C.L., Oxford; Charles Benjamin Bright Maclaren, Esq., M.A., Edinburgh;

William Webb Spencer Follett, Esq., B.A., Cambridge; Hugh Heugh Riach, Esq., Magadalen College, Oxford; William Henry Glover, Esq., Esq., LL.B., University of London; William Michael Spence, M.A., Cambridge, Fellow of Pembroke College; Edward John Payne, Esq., M.A., Oxford, Fellow of Unicersity College; John Haviland, Esq., M.A., Cambridge; Reginald John Lake, Esq., B.A., Oxford; Charles James Tennant Dunlop, Esq., M.A., Oxford; Francis Henry Pitt-Taylor, B.A., Cambridge; Robert Edward Hallett Holt, Esq.; Edward Fortescue Torriano, Esq.; Madgwick George Davidson, Esq., M.A., Oxford; William John Tanner, Esq., B.A., Oxford.

Inner Temple.—Oliver Alexander Ainslie, Esq., London; Chas. Henry Walton, Esq., Oxford; Herbert Cary George Batten, Esq., B.A., Cambridge; Charles Awdry, Esq., M.A., Oxford; Ernest Frederic Silvester, Esq., Oxford; John Heywood Johnstone, B.A., Cambridge; Francis Medland Phillips, Esq., Associate of King's College; Robert Chellas Graham, Esq., B.A., Cambridge; Heighway Jones, Esq., jun., LL.B., Cambridge; Edward Boycett Jenkins, Esq., B.A., Oxford; Rudolph Eyre Melsheimer, Esq., B.A., Cambridge; William Pickford, Esq., B.A., Oxford; Cecil Francis Parr, Esq., Oxford; Charles Tyrrell Giles, B.A., Cambridge; Goodwin Young, Esq., B.A., Cambridge; Arthur William Roberts, Esq., B.A., Oxford; Arratoon Carapiet, Esq., B.A., Cambridge; John Alexander Apcar, Esq.; William Edward Norris, Esq.; David Jardine Jardine, Esq., B.A., Cambridge; William Frederick Alphonse Archibald, Esq., M.A., Oxford; Henry John Church, Esq.; Thomas Latham, Esq., B.A., Cambridge; Cecil Isaacson, Esq., B.A., Cambridge; Edward Majoribanks, Esq.; John Frederic Clerk, Esq., B.A., Oxford; Charles Edward Jones, Esq.; James Bigg Porter, Esq.

Middle Temple.—Robert William Taylor, Esq., University of London, B.A., holder of the First Studentship from the Council of Legal Education in May, 1874; John Fletcher Moulton, Esq., of Christ's College, Cambridge, Fellow and Lecturer; Arnold Jeffries Cleaver, Esq.; Stephen Herbert Gatty, Esq., of New College, Oxford; John Temple Ashwell Cooke, Esq.; Robert William Broomfield, Esq.; Walter Annis Attenbrough, Esq., of Trinity College, Cambridge, B.A.; George Humphreys, Esq., of Queen's University, Dublin, B.A.; William James Howard, Esq., of Trinity College, Dublin, B.A.; George Osmond Beeby, Esq.; Charles William Buller, Esq., of All Souls' College, Oxford, B.A.; William Davey, Esq., of Trinity Hall, Cambridge, B.A.; Sir David Lionel Salomons, of Caius College, Cambridge, B.A.; Frank Normandy, Esq.; Thomas Alfred Spalding, Esq.; Henry

Boyes Mygliston, Esq.; John Gerard Laing, Esq., of Clare College, Cambridge, B.A., and London University; Charles Henry Marriott Wharton, Esq.; David Alfred Aird, Esq., of St. Mary Hall, Oxford; Yves Pieare Antoine Jollivet, Esq.

Grays Inn:—Francis Phillips, of 96, Gloucester Crescent, Hyde Park, Middlesex, the only surviving son of the late Charles Henry Phillips, F.R.C.S., of 6, Trafalgar Square, Brompton, in the said county.

COUNCIL OF LEGAL EDUCATION

Hilary Examination, 1875.

The attention of students is requested to the following rules:—

As an encouragement to students to study Jurisprudence and Roman Civil Law, twelve studentships of one hundred guineas each shall be established, and divided equally into two classes; the first class of studentships to continue for two years, and to be open for competition to any student as to whom not more than four terms shall have elapsed since he kept his first term, and the second class to continue for one year only, and to be open for competition to any student not then already entitled to a studentship, as to whom not less than four and not more than eight terms shall have elapsed since he kept his first term; two of each class of each studentships to be awarded by the Council, on the recommendation of the committee, after every examination before Hilary and Trinity Terms respectively, to the two studentships of each set of competitors who shall have passed the best examination in Jurisprudence and Roman Civil Law. But the committee shall not be obliged to recommend any studentships to be awarded if the result of the examination be such as in their opinion not to justify their recommendation. Any student admitted before January 1, 1873, shall be entitled to compete for the studentships above mentioned; provided that at the time of his examination not more than eleven terms shall have elapsed since his admission. No student admitted after December 31, 1872, shall receive from the council the certificate of fitness for call to the bar required by the four Inns of Court, unless he shall have passed a satisfactory examination in the following subjects, viz., 1. Roman Civil Law; 2, Law of Real and Personal Property; and 3 Common Law and Equity. No student admitted after December 31, 1872, shall be

examined for call to the bar until he shall have kept nine terms ; except that students admitted after that day shall have the option of passing the examination in Roman Civil Law at any time after having kept four terms. An examination will be held in January next, to which a student of any of the Inns of court, who is desirous of becoming a candidate for a studentship or honours, or of obtaining a certificate of fitness for being called to the bar, or of passing the examination in Roman Civil Law, will be admissible. Each student proposing to admit himself for examination will be required to enter his name at the treasurer's office of the Inn of Court to which he belongs, on or before Monday, December 21 next ; and he will further be required to state in writing whether his object in offering himself for examination is to compete for a studentship or honours, or of obtaining a certificate preliminary to a call to the bar, or whether he is merely desirous of passing the examination in Roman Civil Law under the above-stated rule.

The examination will commence on Friday the first day of January next, and will be continued on the Saturday, Monday, Tuesday, and Wednesday following. It will take place in the hall of Lincoln's Inn ; and the doors will be closed ten minutes after the time appointed for the commencement of the examination. The examination by printed questions will be conducted in the following order :—Friday and Saturday, January 1 and 2, at ten until one, and from two until five on each day, the examination of candidates for studentship in Jurisprudence and Roman Civil Law. The examination of candidates for honours and pass certificates will take place as follows :—Monday morning, January 4, at ten until one, on Constitutional Law and Legal History ; in the afternoon, at two until five, on Equity. Tuesday morning, January 5, at ten until one, on Common Law ; in the afternoon, at two until five, on the Law of Real and Personal Property. Wednesday morning, January 6, at ten until one, on Jurisprudence, Civil and International Law, Public and Private and Roman Civil Law. The oral examination will be conducted in the same order, during the same hours, and on the same subjects, as those already marked out for the examination by printed questions

JURISPRUDENCE, CIVIL AND INTERNATIONAL LAW.

Candidates for the studentships will be examined in all the following subjects :—1. Institutes of Gaius and of Justinian. 2. The first book of the Institutes of Justinian (illustrated by corresponding portions of the digest) 3. History of Roman Law (Ortolan.) 4. Principles of Jurisprudence, as developed by

Bentham, Austin, and Maine. 5. Elements of International Law (Woolsey.) 6. Elements of Private International Law (Story.) Candidates for honours will be examined in those numbered 1, 3, and 5; candidates for a pass certificate in the Institutes of Justinian (Sandars's edn.)

The examiner in Constitutional Law and Legal History will examine in the following books and subjects:—1. Hallam's Middle Ages, chap. 8. 2. Hallam's Constitutional History. 3. Broom's Constitutional Law. 4. The Principal State Trial of the Stuart Period. 5. The concluding chapter of Blackstone on the Progress of the Laws of England. Candidates for honours will be examined in all the above-mentioned books and subjects; candidates for a pass certificate only will be examined in No. 1 and No. 4 only, or in No. 2 and No. 3 only of the foregoing subjects, at their option.

The examiner in Equity will examine in the following subjects: 1. Trusts. 2. Injunctions. 3. Specific Performances. 4. Partnership. 5. Notice (Actual and Constructive.) Candidates for honours will be examined in the above-mentioned subjects, under heads 1, 3, 4, and 5. Candidates for a pass certificate only, in those under heads 1 and 2.

The examiner in the Law of Real and Personal Property will examine in the following subjects:—1. The Feudal Law, as adopted in England, and the Statutory Changes in it. 2. Estates, Rights, and Interests in Real and Personal Property; and Assurances and Contracts concerning the same. 3. Mortmain; Perpetuity or Remoteness; Conditions; Easements; Notice, Election, and Satisfaction. Candidates for a pass certificate only will be examined in the elements of the foregoing subjects; candidates for honours will have a higher examination.

The examiners in Common Law will examine in the following subjects;—1. The Law of Contracts and Mercantile Law. 2. The Law of Torts. 3. The Law of Crimes. 4. The Law of Procedure and Evidence. Candidates for a pass certificate only will be examined on general and elementary principles of law; and from candidates for honours the examiners will require a more advanced knowledge of the application of those principles, and a knowledge of leading decisions.

APPOINTMENTS.

THE following have been appointed election judges for the next twelve months: Mr. Justice Lush, Mr. Justice Honyman, and Mr. Baron Pigott. In Ireland the election judges will be Mr. Justice O'Brien, Mr. Justice Keogh, and Mr. Baron Fitzgerald. Lord

Penzance has been appointed a member of the Royal Commission on Army Promotion. The following have been appointed a Committee to inquire and report upon the effect of the various legislative changes in the system of bankruptcy administration, since 1831:—Mr. Rupert Kettle (County Court Judge), Mr. Registrar Brougham, Mr. Parkyns (Comptroller in Bankruptcy), Mr. Hackwood (Solicitor), and Mr. Nichol (of the County Court Treasury Department). Mr. E. P. Price, Q.C., has been appointed a County Court Judge, for the Norfolk Circuit, and Mr. W. H. Cooke has been transferred to Oxford. The appointment of Vinerian Reader in Law has been conferred on Sir William Reynell Anson, Bart, M.A., Fellow of All Souls' College. Francis Campbell Bayard, B.A., of St. John's College, has been elected to a MacMahon Studentship in Law. Mr. George Loch, Q.C., Attorney-General to his Royal Highness the Prince of Wales, has been appointed Treasurer of the Society of the Middle Temple, in succession to Mr. J. R. Kenyon, Q.C., whose year of office has expired. Mr. William Binn Smith, Solicitor, has been appointed Chief Clerk in Vice-Chancellor Hall's Chambers. Mr. William Brice has been appointed Town Clerk of Bristol, and Mr. Henry Galtside, Town Clerk of Ashton-under-Lyne.

CENTRAL CRIMINAL COURT.—The following days have been fixed for the opening of the sessions:—Monday, November 23; Monday, December 14; Monday, January, 11, 1875; Monday, February 1; Monday, March 1; Monday, April 5; Monday, May 3; Monday, June 7; Monday, July 12; Monday, August 16; Monday, September 20; and Monday, October 15.

THE WINTER CIRCUITS.—Mr. Justice Mellor and Mr. Justice Blackburn will open the commission at Manchester on the 26th ult., and will follow on to Liverpool in due course. The following winter circuits are fixed:—Circuit No. 3 (Mr. Justice Brett).—Stafford, Monday, December 7; Worcester, Saturday, December 12; Chester, Thursday, December 17. Circuit No. 5 (Mr. Justice Denman).—Yorkshire, West Riding (Leeds), Monday, November 30; Warwick, Saturday, December 12. Circuit No. 4 (Baron Cleasby).—Northumberland (Newcastle-upon-Tyne), December 1; Durham, December 8; Leicestershire and Leicester and Borough, December 17. Circuit No. 5 (Mr. Justice Denman).—Yorkshire, West Riding (Leeds), November 30; Warwick, December 22.

MUNICIPALITY of LONDON.—Creation of Municipality and County of London.—Extension of the Jurisdiction and Limits of the Corporation of the City of London and of the Limits of the County of the City of London.—Alteration and Consolidation of Institutions.—Dissolution or Alteration of the Constitution and Name of existing Public Bodies within the Metropolis.—Amendment of Acts, and other purposes.

NOTICE IS HEREBY GIVEN, that APPLICATION is intended to be made to PARLIAMENT in the ensuing Session for leave to bring in a BILL and to pass an Act for the following (amongst other) objects or purposes, that is to say :

To extend the jurisdiction of the Corporation of the City of London to the Metropolis, as defined by an Act passed in the 18th and 19th years of the reign of her present Majesty, cap. 120, for the better local management of the metropolis (hereinafter called "The Metropolis Local Management Act, 1855"), or to such other limits as Parliament may fix, and to create a county of London, and to enact that the area within such extended limits shall be governed by one municipal body, or by such body or bodies as Parliament shall approve, who shall be incorporated under the name or designation of "The Municipality of London," or such other name or designation as Parliament shall think fit.

To vest in the new Corporation all rates, duties, tolls, revenues, real and personal estate, charters, and customs of the City of London, and all rights, gifts, grants, liberties, and privileges, franchises, usages, constitutions, prescriptions, immunities, Acts, bye-laws, and standing orders which at the commencement of the intended Act shall be vested in the mayor, aldermen, and commonalty, or the mayor, commonalty, and citizens of the City of London, or in the Common Council, or in the Court of Aldermen of the City of London, or any committees, trustees, or persons acting under the direction of or in connection with the said mayor, aldermen, and commons, and to constitute a council, committee, or other separate body, for any purpose to be mentioned in the intended Act.

To transfer to and vest in the New Corporation all or some of the functions, powers, authorities, rates and tolls, duties, revenues, and real and personal estates whatsoever, which at the commencement of the intended Act shall be vested in the Corporation of the city of Westminster, the Metropolitan Board of Works, vestries, district boards, and other public bodies, within the limits aforesaid, and to enable the new Corporation to use, exercise, and enjoy, and be liable for the rates, tolls, duties, revenues, real and personal estates, debts, and obligations of the said Corporation of the city of Westminster, Metropolitan Board of Works, vestries, district boards, and other public bodies, and to enable the new Corporation to levy tolls, rates, duties, and charges, and to repeal, alter, or extinguish existing tolls, rates, duties, and charges.

To define the rights, duties, and privileges of the members of the new Corporation, and of the officers and servants thereof, and to confer on them rights, duties, and privileges, and to alter and extinguish any existing rights duties and privileges, and to alter the style or title of the officers of the Corporation, or remove officers, and to pay them compensation by way of annuity or otherwise, and to appoint other officers and servants.

To extinguish and annul all rights, powers, privileges, jurisdictions, laws, usages, and customs now or heretofore used, exercised, or enjoyed, or in force within such extended limits or any part of the metropolis and the cities of London and Westminster, and of any extra-parochial and other place within the proposed limits, at the time of the passing of the intended Act, so far as the same shall at all obstruct or interfere with the objects and purposes of the said intended Act.

To reduce the number of councillors elected to the Common Council of the City of London, and to make such other alterations in the constitution of the present governing body within the City of London as Parliament shall think fit.

To extend the limits of the county of the City of London to the limits of the metropolis, as defined by the Metropolis Local Management Act, 1855, or to such other limits as Parliament shall fix, and to declare that the area within such extended limits shall constitute a county of itself, and shall bear the name of the County of London, or such other name as shall be determined by Parliament, and to alter the limits of the counties forming any part of the metropolis, by excluding from such counties respectively such portions as are within the metropolis, and so far as may be necessary, to repeal, alter, or amend any Act which would interfere with the carrying out of such last-mentioned object.

To transfer to and vest in the new Corporation any hereditaments or personal estate vested in churchwardens or churchwardens, vestries, and district boards, as defined by the Metropolis Local Management Act, 1855, of any parish, or in any person or persons appointed by or on behalf of the said parishioners of the same in trust, or for the benefit of any charitable uses or trust whatever.

To vest in the Corporation and to enable it to exercise all or any of the duties, powers, and authorities vested in the vestry of any parish, or the district board, commissioners, corporations, or body, or in any officer exercising any powers in any district which may be wholly or in part comprised within the limits of the metropolis, and to extinguish the rights and powers of the officers, of vestrymen, and members of district boards, commissioners, corporations, and officers, and of all auditors of accounts, and other public officers exercising any powers within any part of the metropolis.

To appoint justices of the peace, salaried, police, magistrates, and other public officers, and to define their duties and privileges, and to authorise the exertion of police courts and other public buildings, with all necessary conveniences, and incorporate with proposed Act any Acts or Act relating to the government of counties and boroughs, particularly the Acts following, as far as the same are applicable, that is to say :

The Acts of the 5th and 6th year of the reign of his late Majesty King William the 4th, cap. 76, to provide for the regulation of Municipal Corporations in England and Wales, and of all Acts amending the same, and of all other Acts or part of Acts in force for the regulation of Municipal Corporations in England and Wales :

The Metropolis Local Management Act, 1855, and all Acts amending the same, or relating to the Metropolitan Board of Works :

The Act of the 10th year of the reign of his late Majesty King George the 4th, cap. 41, for improving the police in and near the metropolis, and all Acts amending the same, and all other Acts or part of Acts in force for the regulation of the Metropolitan Police Courts, or in relation thereto, respectively :

The Towns Improvement Clauses Act, 1847 :

The Town Police Clauses Act, 1847 :

The Local Government Act, 1858, and all Acts amending the same respectively :

The Lands Clauses Consolidation Act, 1845, and the Lands Clauses Act Amendment Act, 1860 ; and particularly the Acts following, relating to the City of Westminster :—27th Elizabeth, 24 and 25 Vic., cap. 78 ; 1st James 2nd, 80th Chas. 2nd, 31st George 2, c. 18, 9th Geo. 4, c. 61, 7th and 8th Geo. 4, cap. 31, and all other Acts altering or amending such last-mentioned Acts.

And the provisions of any other Act which it may be necessary or convenient to incorporate for carrying into complete effect the subjects and purposes of the intended Act, or any of them.

So far as may be necessary for all or any of the subject purpose of the intended Act it is proposed to repeal, alter, amend, extend, and enlarge the powers and provisions of all Acts, charters, grants, licences, powers, and usages within the metropolis, or the limits of the several boundaries proposed to be established under the powers of the intended Act, and particularly the Acts following :

Relating to the City of London :—43 Eliz., c. 2, 18 Edw. 1, c. 5 ; 11 Geo. 1, c. 18 ; 34 Geo. 2, c. 48 ; 25 Geo. 2, c. 30 ; 12 and 13 Vic., c. 94 ; 11 and 12 Vic., c. 163 ; 14 and 15 Vic., c. 91 ; 1 James 1, c. 21 ; 8 and 9 Will. 3, c. 82 ; 6 Anne, c. 16 ; 57 Geo. 3rd, c. 60 ; 2 and 3 Vic., c. 94 ; 29 Geo. 2, 86 ; 20 and 21 Vic., c. 157 ; 22 and 23 Vic., c. 21 ; 11 and 12 Vic., c. 163 ; 27 and 28 Vic., c. 113 ; 20 and 21 Vic., c. 157 ; 4 and 5 Will. 4, c. 36 ; 10 and 11 Vic., c. 51 ; 15 and 16 Vic., c. 77 ; and all Acts amending the same or relating to the Corporation of the City of London.

And Notice is Hereby further Given that in the event of the proposed Bill being introduced on petition, printed copies of the said Bill will be deposited in the Private Bill Office of the House of Commons on or before the 21st day of December next. Dated this 16th day of November 1874.

WYATT, HOPKINS, and FOOKER,

23, Parliament Street, Westminster.

Parliamentary Agents.

